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INTRODUCTION

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[1]

> GAFFNEY, S.C. (AP)—Four youths appeared in General Sessions Court in connection with a series of break-ins.
> Judge Frank Epps, learning that they had quit school, gave them the choice of returning to school or going on the chain gang.
> Without hesitation, all four chose the chain gang.[2]

While education occupies a cherished position in our country, the reputation of mass institutional education has become tarnished. Besides contemporary critics who react to what they perceive as the overwhelming levelling and deadening effect of our schools,[3] there are a small but growing number of citizens who individually are reacting to institutional education by literally taking matters into their own hands and homes. For a variety of reasons, ranging from the pragmatic to the spiritual,[4] these educational vigilantes, estimated nationally at between 10,000 and 30,000,[5] have removed their children from school, either

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1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

2. Newspaper clipping from the New York Times circa 1960, *reprinted in* 22 GROWING WITHOUT SCHOOLING 1 (1981).

3. *See, e.g.*, J. HOLT, HOW TO TEACH YOUR OWN (1981); J. HOLT, INSTEAD OF EDUCATION (1976); J. HOLT, THE UNDERACHIEVING SCHOOL (1969); I. ILLICH, DESCHOOLING SOCIETY (1971); E. NAGEL, CHEEZ! UNCLE SAM (1974); E. REIMER, SCHOOL IS DEAD (1971); V. SMITH, ALTERNATIVE SCHOOLS (1974).

4. As revealed in the case law, the motives for removing children from public schools have varied dramatically. In two cases, children were instructed at home because bus service to their rural, remote home was terminated. The parents would have had to transport them 34 miles one way to the nearest public school. *See* Gunnison Watershed School Dist. v. Funk, No. 81-JV-3 (Colo. Dist. Ct., Gunnison County, Dec. 30, 1981); Gunnison Watershed School Dist. v. Cox, No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981). On the other hand, in numerous cases parents have believed their children's religious or moral well-being would be jeopardized by public school attendance. *See, e.g.*, Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955); *In re* Falk, 110 Misc. 2d 104, 441 N.Y.S.2d 785 (Fam. Ct. 1981); *In re* Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981). Although the alternative movement of the sixties is on the wane, the Christian Fundamentalist Movement has taken up the slack as an impetus for home study. Packaged home study correspondence programs were at issue in several cases. *See, e.g.*, T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973).

5. *See* P. Lines, Private Education Alternatives and State Regulation 2, 19 n.8 (March 1982) (unpublished article available from Education Commission of the States). "John Holt—whose Boston-based organization, Holt Associates, provides support services for home instruction—estimates that there are more than 10,000 families illegally educating their children at home . . . ." *Id.* at 2. "Dr. Raymond Moore, a home schooling advocate, estimates the number

public or private, and are instructing them at home. While many, if not most, of these people are personally dedicated and sincere in their efforts to provide their children with a valuable education outside of an institutional framework, they are encountering a very real legal barrier in the form of state compulsory school attendance laws. Between the desire, however well-intentioned, to educate one's child outside the mainstream and the legal right to do so fall state statutes — statutes that may not allow home instruction or that may allow it, but only under certain, sometimes quite restrictive, conditions.

Not surprisingly, as the "free school" movement[6] has gained in momentum[7] and become more widespread, state and local officials have responded with more vigorous enforcement of their compulsory education laws.[8] The inevitable result is more litigation and, in some instances, new regulations.[9] As both parents and school officials evidence increasing intransigence, the inescapable fact is that the statutes play a central role in this legal tug-of-war over the education of the child. A secondary, but no less significant, role is played by the courts which, in resolving the disputes between parents and the schools, must apply and interpret the statutes.

Although numerous sources, both popular[10] and scholarly,[11] are

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may be as high as 30,000." *Id.* at 19 n.8. Since there are approximately 15,000 school districts in the nation, on the average each school district appears to have a reasonable possibility of facing such a case.

6. Home instruction is just one alternative for the group advocating education outside the traditional mode. This group is popularly known as the free school movement. Within this movement a far greater, although elusive, number of people are educating their children in small, unapproved, often religiously oriented, schools. *See* Lines, *supra* note 5, at 2; Lines, *State Regulation of Private Education*, 64 PHI DELTA KAPPAN 119 (1982).

7. The home instruction movement may be expanded by the transformation of society through new electronic technologies (ironically, technologies undoubtedly developed by people trained in our nation's schools). The computer-based society has the potential to liberate many parents from their desks or factories and allow them to work at home and if they choose to educate their children at home. Moreover, the "electronic home" plugged into a variety of informational networks provides easy and relatively inexpensive access to educational techniques and materials that once could only be afforded by larger institutions. *See generally* A. TOFFLER, THE THIRD WAVE (1980); A. TOFFLER, LEARNING FOR TOMORROW: THE ROLE OF THE FUTURE IN EDUCATION (1974); *Video Merger of Home and School is Envisioned*, EDUC. WEEK, June 23, 1982, at 4, col. 1.

8. Telephone conversations with Cheryl Karstadt, staff member of Assistant Attorney General, Department of Education of Colorado (June 23, 1982), and with Tom Harmon, Assistant Attorney General, Department of Education and Cultural Affairs of South Dakota (July 16, 1982). *See also* Smith, *A Mother Teaches Her Two Children at Home—But Brookline Says No*, Boston Sunday Globe, Feb. 14, 1982, at 38, col. 1.

9. *See, e.g., infra* note 155.

10. *See, e.g.*, D. WILLIAMSON, STUDY AT HOME: AN ALTERNATIVE TO THE PUBLIC SCHOOL SYSTEM (1979); Arons, *Is Educating Your Own Child a Crime?*, SAT. REV., Nov. 25, 1978, at 16; Nagel, *Home Schooling: The Epitome of Parental Involvement*, 13 COMPACT 30 (1979); Nagel & Shannon, *Should Parents Be Allowed to Educate Their Kids at Home?*, INSTRUCTOR, Oct.

available about home instruction, none have included statutory information in a systematic overview, much less as an organizing framework for the case law.[12] By including statutes[13] and analyzing the case law with them, this article presents a unique and comprehensive overview on the current state of the law of home instruction. The law regarding other aspects of the free school movement is left to other sources. Cases dealing with private unapproved schools are only included selectively for background information.[14]

This article is divided into two main parts. The first part gives a statutory overview, highlighted by a table categorizing various significant provisions of current compulsory school attendance laws. The second, considerably lengthier part, itself subdivided into four subsections, presents the case law. The first subsection, which includes non-home instruction decisions, provides the constitutional context within which the cases and statutes on the right of home instruction fit. The subsequent subsections, focusing specifically on home instruction cases, are organized according to statutory categories. Within these statutory categories the cases are further analyzed on the basis of major issue patterns. A final summary offers some suggestions for legislative and judicial consideration based on the experience to date.

1979, at 30; Ritter, *Read This Before You Veto Home Education Requests*, AM. SCH. BD. J., Oct. 1979, at 38; Stewart, *Reconciling the Competing Interests of Parent and Child*, 13 SCH. L. BULL. 2 (1982). In addition to numerous magazine and newspaper articles on home instruction, there are also two newsletters distributed on a regular basis by home schooling advocacy organizations. *See* GROWING WITHOUT SCHOOLING (Holt Associates, Boston, Mass.); TIDBITS (National Association for the Legal Support of Alternative Schools, Sante Fe, N.M.).

11. *See, e.g.*, L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980); T. VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM (1976); Arons, *The Separation of Church and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76 (1976); Burgess, *The Goddess, The School Book, and Compulsion*, 46 HARV. EDUC. REV. 199 (1976); Lines, *supra* note 5; Nolte, *Home Instruction in Lieu of Public School Attendance*, SCHOOL LAW IN CHANGING TIMES 1 (M. McGhehey ed. 1982); Punke, *Home Instruction and Compulsory School Attendance*, 5 NOLPE SCH. L. J. 77 (1975); Tyack, *Ways of Seeing: An Essay on the History of Schooling*, 46 HARV. EDUC. REV. 355 (1976); Woltz, *Compulsory Attendance at School*, 20 LAW & CONTEMP. PROBS. 3 (1955); Comment, *Home Instruction: An Alternative to Institutional Education*, 18 J. FAM. L. 353 (1979-80); Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191 (1981) [hereinafter cited as Comment, *Home Education*]; Comment, *Parental Rights: Educational Alternatives and Curriculum Control*, 36 WASH. & LEE L. REV. 277 (1979) [hereinafter cited as Comment, *Parental Rights*].

12. Other sources have tended to meld together home instruction and private school cases. In our relatively infrequent references to the latter cases, we have carefully labeled them accordingly.

13. These statutes are variously referred to as compulsory school attendance laws, compulsory education laws, and on occasion, truancy laws.

14. *See, e.g.*, Lines, *supra* note 5.

I. STATUTORY ANALYSIS

Like other issues in education law, such as collective negotiations[15] and reduction-in-force,[16] the law of home instruction is largely dependent upon state statutes. Much of the relevant case law is comprised of state court decisions interpreting compulsory education statutes and state policies or regulations adopted thereto.

Consequently, this article starts with a tabular overview of the state statutes and attendant policies/regulations concerning home instruction. The primary source of these data is a survey of the fifty states conducted and summarized by Charles H. Marston.[17]

15. *See, e.g.*, Zirkel, *An Analysis of Impasse Resolution Provisions of State Teacher-Board Negotiations Statutes*, CURRENT LEGAL ISSUES IN EDUC. 171 (M. McGhehey ed. 1977); Zirkel, *An Analysis of Selected Aspects of Teacher-Board Negotiations Statutes*, 6 NOLPE SCH. L. J. 9 (1976).

16. *See* P. ZIRKEL & C. BARGERSTOCK, THE LAW ON REDUCTION-IN-FORCE (1980).

17. C. Marston, Survey of the Fifty States Re. Statutory Provisions Pertaining to Home Education and Rule Adoption by State Education Agencies (1980) (unpublished document from New Hampshire State Department of Education). Sources that were secondarily used for added information about statutory language and classification were: L. KOTIN & W. AIKMAN, *supra* note 11, at 345-59; D. WILLIAMSON, *supra* note 10, at 65-91; R. Walker, Compulsory School Attendance: Alternatives and Exemptions Provided by Statutory and Case Law in Each of the Fifty States (1976) (unpublished doctoral dissertation at the University of Cincinnati). Updated information was secured from and complete citations are available in Lines, *supra* note 5.

Tabular Analysis of State Statutory Provisions Concerning Home Instruction

	PLUS	LOCUS		TYPE			CRITERIA				
State	State pol. or regs. (1)	Local resp. (2)	State resp. (3)	No Exc. (4)	Equiv. Exc. (5)	Explicit Exc. (6)	Teacher (7)	Time (8)	Mat. (9)	Other (10)	Comments
Alabama		X			/		X	X		X	5,7 - certified private tutor 10 - in English, application, register, reports
Alaska	X	X	X			/	X	X			6 - tutor or state-approved home correspondence program; alternate exemption if "equally well-served by an education experience approved by the school board" 7 - certified teacher as tutor or as supervisor of corresp. prog.
Arizona		X				X	/			/	7 - competent teacher 10 - "in the subjects given in common schools of the state"
Arkansas				X							
California		X			/		X	X		/	5,7 - private tutor or other certified person 10 - in English
Colorado	X	/	X			X	/	/	/		7 - certified teacher or system of home study approved by the state board
Connecticut	X				X		/	/		X	5 - "elsewhere receiving equivalent instruction" 10 - subjects, progress eval., monitoring/supervision by school district
Delaware		X	X		X					X	5 - "elsewhere" 10 - progress evaluation ("by written examination"), subjects prescribed for the elementary schools in the state
Florida		X				X	X			/	10 - attendance records, regular reports
Georgia				X							

Hawaii	X		X			X	/				7 - competent person
Idaho	X	X			X		X	X	X	X	5 - "otherwise comparably" 10 - special services, progress reports, social growth
Illinois				X							
Indiana		/			X						2 - initially with county prosecutor and finally by county judge
Iowa		X			X		X				
Kansas				X							4 - limited to *Yoder*-type exception for children who have completed the eighth grade and who have religious objections
Kentucky				X							4 - Ky. constitution provides: "...nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed...."
Louisiana			X			X				X	10 - "if...sustained curriculum of a quality at least equal to that offered by public schools at the same grade level" (1980 Amendment)
Maine	(X)	/	X		X		(X)				1 - proposed rules 5 - in any other state-approved means 7 - limited exception for noncertified teacher under proposed rules
Maryland		X			X			/			5 - "otherwise" 10 - "in the studies usually taught in the public schools to children of the same age"
Massachusetts		X			X						2 - approved in advance 5 - "otherwise"
Michigan				X							
Minnesota				X							
Mississippi		X				X				X	8 - sufficient period 10 - annual application, language arts & math. progress evaluation (standardized test at parents' expense)

Missouri		X				X		X			2 - juvenile courts 6 - if judged to be "substantially equivalent" 8 - daily during usual school hours
Montana						X					6 - "supervised correspondence study or supervised home study"
Nebraska			X	X							
Nevada		X	X			X				/	6 - "at home...equivalent instruction" 10 - application, kind and amount of instruction
New Hampshire	(X)	X			/					(X)	1 - proposed rules 5 - "manifest educational hardship" 10 - proposed rules: application, specified subjects, progress evaluation, qualified parent
New Jersey		X			X						5 - "equivalent instruction elsewhere"
New Mexico	X	X			/					/	5 - correspondence courses 10 - application
New York		X			X		/	X		X	5 - "elsewhere...substantially equivalent" 7 - competent teacher 10 - specified subjects
North Carolina				X							
North Dakota				X							
Ohio		X				X	/			/	7 - "by a person qualified to teach the branches in which instruction is required" 10 - application
Oklahoma		X			X						5 - "other means"
Oregon	X	X				X	/	/		X	6 - "for a period equivalent...by a parent or private teachers" 10 - usual subjects, progress eval. (state exam), local approval

Pennsylvania	X	X			/		/	/		X	5,7 - properly qualified tutor 8 - daily 10 - in English
Rhode Island		X			X			X		X	10 - in English, attendance records, specified subjects
South Carolina	X	X	/		X						3 - state appeal 5 - "at a place other than a school...[if] substantially equivalent"
South Dakota		X			X		/	/		X	5 - "otherwise" 7 - competent person; 8 - like period of time 10 - in English, same progress eval. (exam), reports
Tennessee				X							
Texas				X							
Utah		X				X		/		/	8 - same length of time 10 - "in the branches prescribed by law"
Vermont	X		X		X					/	3 - Committee on Equivalent Instruction 5 - "otherwise...equivalent" 10 - application, Calvert Home Study Plan for elementary and secondary correspondence courses
Virginia			X			X	/	/			5,7 - "tutor or teacher of qualifications prescribed by the State Board of Education" 8 - same number of days and hours
Washington				X							
West Virginia	X	X				X	/	/	/	X	7 - qualified acc. to local (county) school authorities 8 - length of terms, minutes per day 9 - titles of textbooks 10 - attendance record, same subjects, progress evaluation

Wisconsin		X		X							5 - "elsewhere...substantially equivalent	
Wyoming			X									
[District of Columbia]					[/]						[6 - instructed privately if deemed equivalent by the district board of ed.]	
TOTALS	n=11	n=29	n=12	n=14	n=21	n=15	n=17	n=17	n=3	n=20		

The tabular overview is organized into four sections. The first section, represented by column 1, indicates where state policies or regulations have been adopted to supplement the statutory clauses. The second section, represented by columns 2 and 3, indicates the locus of primary responsibility for administering or enforcing the applicable provisions—local authorities (typically, local or county school districts) or a state agency (typically, the state board or department of education).

The next section is of central importance in terms of the case law. Columns 4 through 6 indicate the type of statutory exception for home instruction. These types demarcate three areas of a continuum, ranging from statutes that have no exception for home instruction, to statutes containing language explicitly allowing for home instruction, within approved boundaries. An intermediate gray area is composed of those statutes that imply an exception for home instruction by allowing for "equivalent" instruction, or some other such term, like "comparable," "otherwise," or "elsewhere."[18] In the case law part of this article, the "no-exception" statute is designated as Category One.[19] The "equivalence" statute is treated as Category Two,[20] and the "explicit" statute is designated as Category Three.[21]

As indicated in the Criteria section of the table, statutes providing an equivalence or explicit exception often provide one or more criteria for assessing the acceptability of a home instruction program. Such criteria include specifications for who must provide the instruction (column 7), when it must be provided (column 8), and what materials must be used (column 9). Other criteria (column 10) may also be mentioned in the applicable provisions.

Entries for the various columns are coded as follows: "X" = clear-cut provision, "/" = partial provision, and "( )" = proposed provision. Where a particular entry seems to merit clarification, the number of the column and the accompanying explanation are provided in the final Comments section.

As the totals at the bottom of the table indicate, slightly more than one-fourth of the states (n = 14) provide no exception for home instruction beyond the possibility of offering it as a private school.

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18. Two marginal areas nevertheless emerged. Statutes that do not mention home instruction but provide for tutoring and/or correspondence study (e.g., Alabama, California, and New Mexico) are classified here under the implied exception category with the designation "/". Statutes that mention equivalence in addition to home instruction are incorporated into the explicit exception category with the added language summarized in the accompanying Comments section of the table.

19. *See infra* notes 121-55 and accompanying text.

20. *See infra* notes 156-267 and accompanying text.

21. *See infra* notes 268-312 and accompanying text.

An approximately equal number of the states (n = 15) explicitly provide an exception for home instruction. In a plurality of states (n = 21, including partial provisions as units rather than as fractions) there is an implied exception to public or private schooling based on broad equivalency language or more narrow, marginal language.

Of the 36 states that provide an equivalence or explicit statutory exception for home instruction, one-third have adopted (n = 11) or proposed (n = 2) regulations or policies to help delineate the legislative language. Similarly, only about one-third (n = 11) of these 36 states authorize the state education agency to have a notable role in administering the applicable provisions. Within this minority, the state agency's authority is primary in seven states, joint in three states, and secondary in one state. In the predominant proportion of the states where the locus of responsibility is primarily or exclusively delegated to the local level, the school district is the applicable agency. In the remaining two states (Indiana and Missouri) the judiciary is the designated forum of first resort.

As for criteria, 17 of the 36 applicable states specify who must provide the instruction. Six of these states require that the instruction be provided only by a certified teacher. In the other 11 states, the person is described by seemingly less restrictive terms such as "competent person" or "qualified tutor."

The other most frequent (n = 17) criterion relates to when the instruction must be offered (column 8). The temporal specifications range from general terms ("sufficient period" or "daily") to detailed prescriptions of how many days per year and/or which hours per day. Materials (column 9) are mentioned as a criterion in only three states, with no great specificity. Other criteria (column 10) include requirements about English being the language of instruction (e.g., California and Pennsylvania), application or other records requirements (e.g., Alabama and Florida), specified subjects of study in broad (e.g., New York and Rhode Island) or fine (e.g., Mississippi and New Hampshire) terms, and progress requirements, such as written examinations (e.g., Delaware, Mississippi, and Oregon). Among the idiosyncratic provisions that merit special mention are Idaho's requirements for the "same quality of special services as are available in the public schools" and for an "educational environment . . . for normal social growth and development of the students," and Vermont's specific provisions for a "Committee on Equivalent Instruction" and, on the elementary school level, for the "Calvert Home Study Plan."

II. CASE LAW ANALYSIS

The court decisions analyzed in this article are grouped according to the type of statute (Category One, Two, or Three) under which they

occur.[22] Within each category, the cases are analyzed according to issues that recur rather frequently. These prevalent and readily discernible issues form logical subgroupings within the larger statutory categories. While some cases deal with only one of these issues, many involve multiple issues and therefore appear in more than one subcategory.

The one issue that transcends our statutory categories and has implications for all three of them is the underlying question of what rights parents have vis-à-vis the state in the education of the child. This balancing question becomes particularly pronounced with regard to the first amendment religion[23] and fourteenth amendment liberty[24] rights of parents when weighed against the governmental interests in compulsory education. We provide an overview of this fundamental question and the historical cases that delineate its contours as a background to the three categories of cases.

A. Constitutional Cases

1. Historical Background

Historically, the education of children in the United States was a matter of parental discretion.[25] Decisions to educate or not to educate, and the substance of that education — method and curriculum — were

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22. *See supra* notes 19-21 and accompanying text.

23. U.S. CONST. amend. I, provides in pertinent part: Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof;* . . . (emphasis added).

The italicized clause above has been interpreted by the United States Supreme Court in numerous decisions to confer upon U.S. citizens a fundamental right to the free exercise of their religion. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *See also infra* notes 50-61 and accompanying text. The establishment clause is not at issue in home instruction cases.

24. U.S. CONST. amend. XIV, provides in pertinent part:

> [N]or shall any State deprive any person of life, *liberty* or property, without due process of law . . . . (emphasis added).

The right to due process takes a variety of forms, including a right to be afforded certain procedural safeguards in a legal or quasi-legal proceeding, and a right in certain matters to make personal decisions without unjustified government interference. In the context of the parents' right to educate their child as they see fit, the right is most usually encountered in the form of a substantive due process argument. In a number of home instruction cases, parents have argued state compulsory attendance laws violate their right to due process by restricting the liberty they as parents ought to have to direct the education of their children.

For a description of substantive due process and the right of privacy as it relates to educational choice, see Carey v. Population Service Int'l, 431 U.S. 678, 684-85 (1977). *See also* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973). For a novel approach to educational choice based on the first amendment protection of freedom of expression, see Arons, *supra* note 11.

25. For an early description of parental rights and duties regarding the education of children, see 1 W. BLACKSTONE, COMMENTARIES 450-53 (1st ed. 1809). For a discussion of the development of the compulsory school attendance laws in the United States, see L. KOTIN & W. AIKMAN, *supra* note 11. For an enlightening analysis of the historical forces that produced the shift from voluntarism to compulsion in American education, see Burgess, *supra* note 11.

made by the parents as a right.[26] It was not until after the Civil War that states began to preempt what had traditionally been viewed as a parental prerogative. By 1900 all the Northern States had adopted some form of compulsory attendance statute.[27] Southern States were a bit slower to respond, but eventually they, too, followed the trend for mandatory attendance.[28] Today every state has some form of compulsory attendance statute.

State power to compel attendance and regulate the form and content of education was acknowledged by the Supreme Court in the landmark case of *Pierce v. Society of Sisters*.[29] Although the case dealt specifically with the constitutionality of an Oregon statute that required attendance at public school, the Court, in dictum, acknowledged a general right of states to require that a child be educated and to regulate the educational process. The Court stated:

> No question is raised concerning the power of the State *reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school* . . . .[30]

Interestingly, the Supreme Court in *Pierce* did not find it necessary to explain or justify this shift in power from parents to the state. Accepted without any other comment than "no question is raised," the shift was a legal fait accompli. Until recently, parents, and children, challenging compulsory attendance laws usually focused on issues less basic than the very right of the state to compel attendance. Recent home instruction cases have shifted the focus back somewhat by challenging, on constitutional grounds, the power of the state to compel attendance and regulate basic educational choices.[31] For the most part these challenges have been unsuccessful.

2. Constitutional Framework: Four Critical Cases

While the right of the state to require education is well accepted, the extent to which that right may be exercised is not unlimited. In a number of cases, most occurring in the 1920's and including *Pierce*, the Supreme Court defined the boundaries of state power.

The first successful Supreme Court challenge to the state's right to regulate education occurred in 1923. In *Meyer v. Nebraska*[32] the Su-

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26. Tyack, *supra* note 11, at 361; Comment, *Parental Rights*, *supra* note 11, at 278.
27. Comment, *Home Education*, *supra* note 11, at 192.
28. *Id.* at 192-93.
29. 268 U.S. 510 (1925).
30. *Id.* at 534 (emphasis added).
31. *See infra* notes 62-116 and accompanying text.
32. 262 U.S. 390 (1923).

preme Court established the principle that the state's right over education was not absolute. In *Meyer,* the Court held unconstitutional a Nebraska statute that prohibited the teaching of a modern language other than English to students who had not completed the eighth grade in any private, parochial, or public school.[33] The defendant, a private school instructor, was charged and convicted for teaching German to a child who had not advanced beyond the eighth grade. Overturning the conviction, the Court struck down this transparently anti-German, jingoistic statute, holding it violated the defendant's right to teach, the students' rights to learn, and the parents' rights to choose, within bounds, what their children would be taught.[34]

The Court found these rights to be liberties protected by the due process clause of the fourteenth amendment.[35] Although the Court recognized "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools,"[36] it found Nebraska's statute to be unreasonable and arbitrary and, therefore, an unconstitutional infringement upon the liberties of teachers, students, and parents.[37]

Two years later, in *Pierce,*[38] the Court again applied the principle established in *Meyer.* The Court noted that the Oregon statute compelling attendance at public school, without providing for a private school alternative, "unreasonably interferes with the liberty of parents and guardians to direct the . . . education of children under their control."[39] Although the plaintiffs were private school corporations[40] seeking injunctive relief from Oregon's essentially "public school only" compulsory attendance law, the Court acknowledged, in dictum, the right of parents to have some choice in the education of their children. The Court noted:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the

33. *Id.* at 400, 403.
34. *Id.* at 400-01, 403.
35. *Id.* at 400.
36. *Id.* at 402.
37. *Id.* at 403.
38. *See supra* notes 29 & 30 and accompanying text.
39. 268 U.S. at 534-35.
40. The *Pierce* plaintiffs were the Society of Sisters, a Roman Catholic organization established in 1880 to care for orphans and educate the young, and Hill Military Academy, organized in 1908 as a military training school for boys.

> 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.[41]

Thus, the *Pierce* ruling sets the boundary for our first category of statutes and cases: in the no-exception category a state cannot require attendance at public school without allowing for, at the minimum, a private school alternative.[42]

The principle established in *Meyer* and in *Pierce,* limiting the power of the state to control the terms and content of education, was relied upon again by the Supreme Court in 1927. Applying the due process clause of the fifth amendment to the Federal Territory of Hawaii, the Court in *Farrington v. Tokushige,*[43] struck down stringent laws regulating the Island's private schools and thereby set further limits on state power.

The express purpose of the Hawaii statute was to assimilate and indoctrinate a large alien population and to promote Americanism.[44] The act, together with the implementing regulations, gave the Territory tremendous power over foreign language schools (mostly Japanese). This power included control over almost all aspects of the educational process. After a lengthy listing of the act's provisions and the various regulations,[45] the Court, in rather summary fashion, struck them down, stating:

> The foregoing statement is enough to show that the school Act and the measures adopted thereunder go far beyond mere regulation of privately-supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. *They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books.*[46]

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41. 268 U.S. at 535.

42. Even while limiting state power to require public school attendance, the Court simultaneously, and rather surreptitiously, legitimatized the right of the state to mandate education and reasonably control the basic terms of the educational process. *See supra* text accompanying note 30. The major significance of *Pierce* may well be this implicit and subterranean recognition of the state's right to make fundamental educational decisions. Missing from *Pierce* was an exploration of how this right came to be wrested from parents and lodged with the state. For various explanations of why the state came to be the repository of this power, see Tyack, *supra* note 11.

43. 273 U.S. 284 (1927).

44. *Id.* at 293. One commentator noted that "[a]s with the *Pierce* case, the Court in *Farrington* was quashing a kind of jingoistic know-nothingism that was common in the 1920's fear of diversity." Arons, *supra* note 10, at 17.

45. 273 U.S. at 291-96.

46. *Id.* at 298 (emphasis added).

The *Farrington* Court acknowledged there was a right to regulate private schools, but that right could not be so extensive as to effectively eliminate the alternatives offered by private schools.[47] The Court set forth the principle that the state (in this instance, the Territory of Hawaii) cannot excessively control the terms and content of nonpublic schools, so as to rob them of their character as alternatives to public schools.[48]

These three Supreme Court decisions set the due process framework for the constitutional limits on the right of the state to require and regulate education. The issue of state power vis-à-vis parental power remained relatively dormant until the 1970's,[49] when the Supreme Court squarely confronted the issue in *Wisconsin v. Yoder*.[50] Whereas in the earlier cases the Court relied upon due process, specifically the freedom to choose educational alternatives, in *Yoder* the Court applied the first amendment right to the free exercise of religion.[51]

Affirming the Wisconsin Supreme Court's reversal of a conviction of Amish parents for violating the state's compulsory attendance law, the Court set another constitutional boundary on the states. The Court in *Yoder* held:

> [The] State's interest in universal education . . . is not totally free from a balancing process when it impinges on [other] *fundamental rights . . . 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 . . . .*[52]

While this ruling might appear to be a rather significant limit on the power of the state vis-à-vis the power of the parent, the Court was quite careful to narrowly circumscribe its scope.[53] The *Yoder* Court insisted that in order to trigger constitutional protection, the parental interest must be religious in nature rather than philosophical or personal; the religious interest must be long-standing and sincerely held; continued secular education must pose a real, rather than perceived, threat to the religious interests involved; and the disruption to the

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47. *Id.*

48. *Id.*

49. From the twenties to the seventies, the Supreme Court, in a number of decisions, alluded to the right of parents vis-à-vis the right of the state in the education of the child. These references, however, were tangential to the home instruction issue. *See* Runyon v. McCrary, 427 U.S. 160, 177-79 (1975); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

50. 406 U.S. 205 (1972).

51. *See supra* note 23.

52. 406 U.S. at 214 (emphasis added).

53. For a contrary view, see Comment, *Home Education, supra* note 11.

child's education should not seriously impair the child's future nor should it threaten the public order in any significant way.[54] In order to tip the balance away from the strong state interest in compulsory education, the parents would have to satisfy all of these narrowly defined criteria.

Based on uncontested evidence, the Court in *Yoder* found an interdependence between Amish religious beliefs and the Amish way of life, an interdependence that was clearly threatened by continued attendance in secular schools.[55] There was also no dispute as to the sincerity of the Amish claims, nor that they were religious in nature rather than philosophical or personal values.[56] The Court emphasized it was "not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."[57] Furthermore, the Amish parents only wanted to remove their children from public schools after the eighth grade. Thereafter, they would continue to be educated in Amish schools "characterized by the undisputed testimony of expert educators as 'ideal' vocational education . . . ."[58] The Court concluded the Amish system would not harm the child in any significant way, nor would it threaten the public safety, peace, or order.[59]

The Court even commented on the unusual and idiosyncratic nature of the Amish claim, stating:

> [The Amish made] a convincing showing, *one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept,* it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.[60]

The extended applicability of *Yoder,* even for other religious groups, is dubious. One is hard pressed to give an example, outside the Amish, where the Court's narrowly defined criteria for a successful first amendment challenge would be met. Chief Justice Burger, writing for the majority in *Yoder,* warned:

> Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power

54. 406 U.S. at 215-19, 222-36.
55. *Id.* at 215-18.
56. *Id.* at 216.
57. *Id.* at 235.
58. *Id.* at 224.
59. *Id.* at 230.
60. *Id.* at 235-36 (emphasis added).

of the State to promulgate reasonable standards . . . .[61]

These four cases, *Meyer, Pierce, Farrington*, and *Yoder*, combine to form the legal framework for the power of the state to require and regulate education. While not dealing specifically with the right of home instruction, these cases form the constitutional backdrop against which home instruction cases must be viewed.

3. Constitutional Challenges: Recent Developments

Increasingly, parents who are prosecuted for instructing their children at home are attacking compulsory school attendance statutes on constitutional grounds. Cutting across statutory divisions, these challenges, if successful, promise to restructure the state-parent balance set in *Meyer, Pierce, Farrington*, and *Yoder;* a balance that while recognizing restrictions on state power, now tilts in favor of the state. Although no case dealing specifically with home instruction has yet reached the Supreme Court, the increased number of court challenges and the increased activism of the home instruction movement[62] may well produce a Supreme Court ruling in the future. Constitutional challenges have generally been based on the first[63] or fourteenth[64] amendment.

In many of the home instruction cases parents, for religious reasons, have removed their children from school and instructed them at home or in an unaccredited, religiously-affiliated school.[65] Prosecuted for violating the compulsory attendance laws, these parents argue they have a highly protected first amendment freedom to educate their children according to their religious precepts and values.

As noted, the Supreme Court in *Yoder* recognized a parental religious right could outweigh the state interest in compulsory attendance.[66] Prior to *Yoder*, the free exercise arguments for home instruction were consistently rejected by the courts.[67] Not surprisingly, given the narrowness of the ruling in *Yoder*, the free exercise argument has met with limited success in the years since *Yoder*.[68] The reasons have va-

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61. *Id.*

62. *See supra* text accompanying notes 5-9.

63. *See supra* note 23.

64. *See supra* note 24.

65. At last count, of 14 decided cases and two or three pending cases, approximately 20% of all home instruction cases involved a first amendment religious freedom argument.

66. *See supra* notes 50-61 and accompanying text.

67. *See, e.g.*, State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, 389 U.S. 51 (1967); Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955); Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948). *Cf.* Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S.2d 830 (Fam. Ct. 1950) (private school case).

68. *See* State v. Nobel, Nos. S791-0114-A, S791-0115-A (Mich. Dist. Ct., Allegan County,

ried. In some instances parents have not presented sufficient evidence to show their interest was religious in nature.[69] In others, even though the interest was religious in nature, it still did not rise to the level required by *Yoder* to trigger sufficient constitutional protection.[70]

Even though successes based on a first amendment, *Yoder*-like, religious interest are relatively few, there are indications the defense may have viability. In two recent Ohio cases, parents have successfully employed the first amendment *Yoder* defense in gaining reversals of their convictions by the state's highest court. While both cases involved instruction in unaccredited, religiously-affiliated schools, there are implications for the rights of parents who desire, for religious reasons, to instruct their children at home.

Although the earlier case, *State v. Whisner,*[71] was broader in scope than the later case, *State ex rel. Nagle v. Olin,*[72] both were Ohio Supreme Court cases that involved similar factual patterns and, on the first amendment issue, both were decided in the same way and for the same reasons; the *Olin* decision in fact relied extensively on *Whisner.* The parents in *Whisner* and *Olin* were convicted for failing to send their children to state-approved schools, choosing instead to educate them at nonpublic, religiously-oriented schools; schools that did not conform to the "minimum standards" promulgated by Ohio's State Board of Education.

The group of parents in *Whisner* were "born again" Christians who maintained that attendance in schools adhering to Ohio's minimum standards was incompatible with their religion. The defendant in *Olin,* although not Amish, sent his daughter to an unaccredited Amish school, fearing that if she were educated according to the "humanistic," unchristian values mandated by Ohio's minimum standards, he would subject himself, and his daughter, to eternal damnation. In both cases, the Ohio Supreme Court found the claims satisfied the rigid criteria established in *Yoder.*[73] The court accepted that the beliefs were

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Jan. 9, 1980). *See also* Kentucky State Bd. for Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied,* 446 U.S. 938 (1980). These are private school cases based on a unique state constitutional provision that provides, "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." KY. CONST. of 1850, art. X, § 5. *See also* State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976) (private school case). *Cf.* State *ex rel.* Nagle v. Olin, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980) (private school case); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (private school case).

69. *See, e.g.,* State v. Moorhead, 308 N.W.2d 60 (Iowa 1981).

70. *See, e.g.,* State v. Riddle, 285 S.E.2d 359 (W. Va. 1981). *See also infra* text accompanying notes 309-12.

71. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

72. 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980).

73. *Id.* at 350, 415 N.E.2d at 285-86; 47 Ohio St. 2d at 204, 351 N.E.2d at 764.

religious in nature, rather than philosophical or personal; sincerely and deeply held; and there existed a strong interdependence between the educational experience and the inculcation of the parental religious values.[74] The court also found the application of the minimum standards to nonpublic schools, while not a direct regulation as in *Farrington*,[75] indirectly allowed the state to control the content and terms of education in Ohio; including the curriculum, the method and hours of instruction, the teachers, the physical plant, and even the educational policies.[76] In both cases, the court concluded the result was the "obliteration" of the distinction between public and nonpublic schools and the "absolute suffocation" of religious education.[77]

Relying substantially on *Yoder*, the court in *Whisner* noted the state's " 'minimum standards' overstep[ped] the boundary of *reasonable* regulation as applied to a non-public religious school."[78] The court went on to conclude the state had infringed upon the defendants' religious freedom guaranteed them under the first amendment and elucidated in *Yoder*.[79] Because of the factual similarities, and the absence of adequate changes in Ohio's minimum standards, the court in *Olin* simply reiterated its earlier conclusions in *Whisner*.[80]

It is difficult to assess the significance these two cases hold for the home instruction movement. Any such assessment raises a number of questions. Are these decisions only aberrations, limited in scope to Ohio?[81] Do they add anything to the *Yoder* first amendment protection of a religious right, either by broadening the scope of protected "religious" interests or by tightening the limits on acceptable state regulation of education? Finally, what is the value of these cases for parents instructing their children at home rather than in an unaccredited, religiously-affiliated school? Whether the *Whisner* and *Olin* view will be accepted in other jurisdictions is difficult to predict.

It would appear reasonable to assume the religious rights protected

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74. 64 Ohio St. 2d at 341-45, 415 N.E.2d at 281-84; 47 Ohio St. 2d at 199-200, 351 N.E.2d at 761-62.

75. *See supra* notes 43-48 and accompanying text.

76. 64 Ohio St. 2d at 352, 415 N.E.2d at 286-87; 47 Ohio St. 2d at 215-16, 351 N.E.2d at 770.

77. 64 Ohio St. 2d at 353, 415 N.E.2d at 287; 47 Ohio St. 2d at 211-12, 215, 351 N.E.2d at 768, 770.

78. 47 Ohio St. 2d at 204, 351 N.E.2d at 764 (emphasis in original).

79. *Id.*

80. 64 Ohio St. 2d at 352, 415 N.E.2d at 286-87.

81. *See, e.g.*, Comment, *Parental Rights*, *supra* note 11.

Since the Ohio court greatly extended the parents' rights, the *Whisner* opinion may not offer an accurate indication of the Federal constitutional limits of state regulation of private education.

Id. at 287-88.

in *Whisner* and *Olin* are not contingent upon where the child is instructed. The court's rulings in both cases were directed at unreasonable state regulation that infringed upon the free exercise of religion of the parents. It was the content of the minimum standards (unreasonable regulation) and their effect (abridgement of basic religious freedoms) that concerned the court, not the source of the alternative religious education. Home instruction on religious grounds would thus appear to come within the *Whisner-Olin* rubric, whatever its strength may be.

An unpublished Michigan decision supports this conclusion, and offers some guidance for the answers to the other questions. However, its significance is limited by its fact pattern and its unreported status. In *State v. Nobel,*[82] the court held the religious interests of the defendants in educating their children at home overrode Michigan's statutory (Category One) requirement of teacher certification.[83] Because Mrs. Nobel possessed all the qualifications necessary for teacher certification but refused on religious grounds to obtain it, the court found the requirement a mere formality.[84] Relying on *Whisner,* the court reasoned that because of the religious nature of the defendants' claim and because of the superfluous nature of her certification, the requirement was an undue restriction on the defendants' religious freedom.[85] Dismissing the criminal charges against the defendants the court cryptically concluded:

> The Nobels have a documented and sincere religious belief and this Court won't and no Court should interfere with the free exercise of a religious belief on the facts of this case.[86]

Other home instruction cases, which are still pending, may provide more definite answers about the strength of *Whisner* and *Olin.*[87]

The other constitutional attack on compulsory attendance laws argues primarily on fourteenth amendment due process grounds that parents have the right, that is, liberty, to educate their children as they see fit. Like the first amendment theory, this argument cuts across statutory categories and has the potential, if successful, to restructure the current state-parent balance. Unlike the first amendment theory, there

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82. State v. Nobel, Nos. S791-0114-A, S791-0115-A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980). *See infra* text accompanying note 125.

83. Nos. S791-0114-A, S791-0115-A at 11-12.

84. *Id.* at 11.

85. *Id.* at 9-10.

86. *Id.* at 12.

87. *See, e.g.,* Memorandum for Defendant at 11, State v. Dufour, No. PC 81-52 (Ind. Cir. Ct., Washington County, Aug. 1981); Brief for Defendants at 4, State v. Sessions, No. 2958 (Iowa Dist. Ct., Winneshiek County, Feb. 24, 1982).

is no significant Supreme Court decision, like *Yoder*, that expressly and unequivocally advances this position. In fact, although the theory has a popular appeal among those advocating a right of home instruction,[88] few courts have actually accepted the argument.

The crux of the fourteenth amendment due process argument is that parents have a "fundamental"[89] liberty to choose how their children are to be educated, and absent a "compelling state interest,"[90] this right is superior to the state's right to compel attendance and regulate education. It has long been recognized that parents have some rights relating to their children's education.[91] The issue now raised is the degree of constitutional protection afforded such rights.

The conventional judicial view is that parents have a right to a voice in the education of their children, but this right does not rise to a sufficiently protected level to outweigh the state's interest in regulating, or even prohibiting home instruction. This position has been consistently adopted in the earlier, as well as the more recent, home instruction decisions. For example, in 1927 the Ohio Supreme Court, in *Parr v. State*,[92] addressed the issue of the constitutionality of the state compulsory attendance statute. Affirming the conviction of the parents for educating their children at home in violation of the (at that time Category One) statute, the court summarily weighed the balance in favor of the state:

> Compulsory education laws have very generally been upheld by the courts. 'Statutes making the education of children compulsory have become very general in the United States, and *their constitutionality is beyond dispute, for the natural rights of a parent to the custody and*

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88. *See, e.g.*, TIDBITS 2-5 (Spring-Summer 1981) (National Association for the Legal Support of Alternative Schools, Santa Fe, N.M.).

89. The Supreme Court has recognized rights specified or clearly implied in the Constitution as fundamental, and thus has afforded them special protection. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

90. Hanson v. Cushman, 490 F. Supp. 109, 112 (W.D. Mich. 1980):

> Plaintiffs claim that the parental right to control the education that their children receive is protected by the penumbra of the first nine amendments and the Fourteenth Amendment to the United States Constitution. The case stands or falls on their argument that this claimed right rises to the level of a 'fundamental' constitutional right. *This argument is crucial because where governmental regulation impinges upon a fundamental constitutional right, the normal presumption of constitutionality accorded to governmental action is inverted. Instead of asking the usual question whether the regulation has any conceivable rational basis, the Court will insist that the governmental action be justified as necessary to achieve an interest of the state that is compelling.*

Id. (emphasis added). *See infra* text accompanying note 99.

91. *See supra* notes 25-31 and accompanying text.

92. 117 Ohio St. 23, 157 N.E. 555 (1927).

> *control of his infant child are subordinate to the power of the state,* and may be restricted and regulated by municipal laws . . . .'
>
> Additional authorities might be cited in support of this proposition; but we regard the constitutionality of such laws as so well established that other citation is unnecessary.[93]

Fifty years later, a New York appellate court, in *In re Franz,*[94] affirmed the defendant's conviction for violation of the compulsory education law (a Category Two statute). The court upheld the constitutionality of the law, reasoning:

> Our . . . [statute] strikes a happy balance . . . . There is no rigid, robotlike regimentation of children; nor conversely, can each child step to the music that he hears, however measured or far away. *The State's interest in education is, to a degree, paramount.*[95]

The court refused to accept the defendant's argument[96] that her nonreligious claim was entitled to the same level of constitutional protection that was given the parents in *Yoder,* stating, "[h]owever we may try to fit the . . . argument, procrustean-like into *Yoder,* there is no credible analogy between the two."[97]

In two recent federal cases, *Scoma v. Chicago Board of Education*[98] and *Hanson v. Cushman,*[99] the courts specifically and emphatically rejected the contention that the parents had an independent, nonreligious, fundamental right in the education of their children. In *Scoma,* the parents sought an injunction and declaratory judgment to prevent the Chicago School Board from interfering with their decision to educate their two school age children at home. The federal district court in Illinois observed that the plaintiffs were asserting new and wide-ranging fundamental constitutional rights that included:

> [The] right and duty to educate their children adequately but as they see fit; to rear their children in accordance with their determination of what best serves the family's interest and welfare; to be protected in their family privacy and personal decision-making from governmental intrusion; to distribute and receive information; and to teach and to ensure their chil-

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93. *Id.* at 26, 157 N.E. at 556 (emphasis added).

94. 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977). *See infra* notes 259-61 and accompanying text.

95. 55 A.D.2d at 430, 390 N.Y.S.2d at 944 (emphasis added).

96. Although most of the nonreligious claims have centered on a fourteenth amendment substantive due process argument, the defendant in *Franz* framed her argument primarily in terms of a right of privacy protected by the ninth and fourteenth amendments. *See infra* notes 111-14 and accompanying text.

97. 55 A.D.2d at 431, 390 N.Y.S.2d at 944.

98. 391 F. Supp. 452 (N.D. Ill. 1974). *See infra* note 154 and accompanying text.

99. 490 F. Supp. 109 (W.D. Mich. 1980).

dren's freedom of thought and inquiry.[100]

A number of constitutional theories were advanced in support of these fundamental rights, including substantive due process, privacy and equal protection. The Scomas were not claiming a religious interest in the home instruction of their children. Rejecting the Scomas' direct assault on the Illinois law (a Category One statute), the court distinguished *Pierce* and *Yoder*, stating:

> The courts have held that the state may constitutionally require that all children attend some school, under the authority of its police power. *Plaintiffs have established no fundamental right which has been abridged by the compulsory attendance statute. Thus, the state need not demonstrate a 'compelling interest' . . . in requiring children to attend school.* Under the test of *Pierce* and *Yoder* the Illinois statute . . . is reasonable and constitutional.[101]

The parents in *Hanson*, which was decided in 1980, six years after *Scoma*, also sought a declaratory judgment that Michigan's (Category One) compulsory school attendance law was unconstitutional. As with *Scoma*, the parents' claim hinged upon the court's recognition that they enjoyed a fundamental right to control the education of their children. Refusing to recognize the fundamental status of their claim absent a religious interest, the federal district court in Michigan dismissed the action, stating:

> Plaintiffs have cited no cases to the Court that have held that parents have a fundamental constitutional right to educate their children at home, nor has the Court's research uncovered any . . . .[102]

In disposing of the plaintiffs' claim the court further stated:

> [The] plaintiffs have established no fundamental right that has been abridged by Michigan's compulsory attendance statute . . . or by its requirement of teacher certification . . . . Thus the state need not demonstrate a 'compelling interest' but only that it acted 'reasonably' in requiring children to attend school and that children be taught only by certified teachers.[103]

Although most courts have refused to recognize that parents have a fourteenth amendment fundamental right to control the education of their children, or have summarily weighed the balance in favor of the state, there are some exceptions. However, these decisions are limited

100. 391 F. Supp. at 460.
101. *Id.* at 461 (emphasis added).
102. 490 F. Supp. at 112.
103. *Id.* at 114-15.

in their precedential value.[104]

The aforementioned *Whisner*[105] is undoubtedly the most notable exception because of the status of the court and the unequivocal nature of the ruling. While the crux of the *Whisner* court's decision to reverse the parents' convictions was based primarily on a first amendment *Yoder*-like theory, and specifically related to a private unapproved school, the court additionally elaborated on the nature of the parental rights in due process terms, stating:

> [In *Farrington, Pierce,* and *Meyer*] the court utilized the "liberty" concept embodied within the due process clause of the Fourteenth Amendment to invalidate legislation that interfered with the right of a parent to direct the education, religious or secular, of his or her children. Thus, it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a "fundamental right" guaranteed by the due process clause of the Fourteenth Amendment.[106]

Other courts recognized that *Farrington, Pierce,* and *Meyer* placed limits on state action, but none prior to *Whisner* had taken the extra step of recognizing a fourteenth amendment fundamental right of parents to control the education of their children. The extra step taken by the *Whisner* court has the effect of restructuring the state-parent balance so as to tip it in favor of the parents, unless the state can show a compelling interest that cannot be satisfied with less restrictive means.[107]

The other exception is *Perchemlides v. Frizzle,*[108] an unreported, Massachusetts lower court decision that dealt specifically with home instruction. Following the rejection of their home instruction program by the local school authorities, the Perchemlideses sought a declaration by the court that the rejection violated their constitutional and statutory right to educate their child at home. The Perchemlideses had removed their six-year-old son from school because they were dissatisfied with the education he was receiving and were convinced they could give him a superior education at home. Their decision was not religiously motivated.

The Massachusetts (Category Two) statute exempted from public

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104. For example, two of the exceptions were decided before *Hanson. See* Perchemlides v. Frizzle, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). *See also supra* note 81; *infra* note 115 and accompanying text.

105. *See supra* notes 71-87 and accompanying text.

106. 47 Ohio St. 2d 181, 213-14, 351 N.E.2d 750, 769 (1976).

107. *See* Comment, *Home Education, supra* note 11, at 204.

108. No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978).

school attendance a child "otherwise instructed in a manner approved in advance by the superintendent or the school committee."[109] In 1893, the Massachusetts Supreme Judicial Court, applying a slightly different statute, had construed the language "otherwise instructed" to include home instruction as an exemption, provided it was "given in good faith and sufficient in extent."[110] On the basis of the statute and the earlier case, the *Perchemlides* court concluded that "[w]ithout doubt, then, the Massachusetts' compulsory attendance statute might well be constitutionally infirm if it did not exempt students whose parents prefer alternative forms of education."[111] Without identifying a specific constitutional amendment, the court attributed the potential infirmity to a right of privacy independent of the first amendment.[112] The court included within the notion of privacy the right of "non-religious as well as religious parents . . . to choose from the full range of educational alternatives for their children."[113] Presumably contained within this, and other equally ambiguous dictum, was a constitutionally protected right to choose the alternative of home instruction. Ironically, the case was decided on a constitutional issue, but that issue proved to be procedural rather than substantive.[114]

The significance of the *Perchemlides* decision should not be overstated. As mentioned, it is an unreported Massachusetts lower court decision that is subject to widely different interpretations.[115] For all the publicity the case generated, its judicial acceptance has been markedly limited.[116] Whether the somewhat skewed logic of the case, particularly in the area of the substantive rights of parents, will become more popu-

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109. MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1982).

110. Commonwealth v. Roberts, 159 Mass. 372, 374, 34 N.E. 402, 403 (1893).

111. No. 16641 at 9.

112. *Id.* at __.

113. *Id.* at 8-9.

114. *Id.* at __. The court's decision was based on fourteenth amendment procedural due process. *See infra* notes 264-67 and accompanying text.

115. *See* Ritter, *supra* note 10.

> Both sides claimed victories when Judge John M. Greaney . . . handed down his decision. Superintendent Frizzle and lawyers for the Amherst school board claim *they* won, because Greaney ruled that parents may not remove their children from school without approval from the board. But, in his 30-page opinion, Greaney also treated in detail the standards and procedures the board may and may not use in approving or denying a home-education plan, which the Perchemlideses and their attorney took as a decision in *their* favor. In any event, the child, Richard Perchemlides, never returned to the Amherst schools, and truancy charges against his parents were dropped. Subsequently, a home-education plan for Richard was approved by the school board.

Id. at 40.

116. A review of home instruction decisions since the *Perchemlides* decision has not revealed a single reference to the case. For examples of the discussion generated by the case, see Arons, *supra* note 10; Bumstead, *Educating Your Child at Home: The "Perchemlides" Case*, 61 PHI DELTA KAPPAN 97 (1979); Nolte, *supra* note 11, at 11; Ritter, *supra* note 10, at 40.

lar among other courts remains to be seen.

Although the power of the state to control educational choices is limited by several key Supreme Court cases, there is no unqualified constitutional right to home instruction. States retain the power to compel attendance at public or private schools and to regulate, at least minimally, the terms of education. The Supreme Court's decision in *Wisconsin v. Yoder* offers some support for a first amendment claim to home instruction.[117] However, the vast majority of such suits have failed to satisfy the Court's criteria. In only one case have parents successfully argued that a religious interest in home instruction outweighed the state's right to regulate education.[118] That case, however, is of very limited precedential value.

Other constitutional theories attempting to limit state power to prohibit home instruction have been less successful. No case has specifically held there is a nonreligious constitutional right to home instruction that is superior to the state's interest in compulsory school attendance. Only one case has recognized parents possess a fourteenth amendment liberty interest in the education of their children that outweighs the interests of the state.[119] However, that case did not deal specifically with a home instruction choice, and the fourteenth amendment theory advanced was clearly secondary, maybe even an afterthought, to the court's first amendment rationale. In one unreported Massachusetts decision, the court, in rather ambiguous dicta, implied there was a nonreligious constitutional basis for home instruction that outweighed the state interest in compulsory school attendance.[120] Although the argument has been presented, there has been no judicial recognition of a nonreligious constitutional right to home instruction.

B. Category One Cases: "No-Exception" Statutes

The cases occurring within jurisdictions that require attendance in public or private schools and that otherwise make no exception, explicit or implicit, for home instruction have tended to cluster around two dominant issues. One issue has been the constitutionality of the no-exception compulsory school attendance law. The other frequently encountered issue has been whether, in the no-exception type of statute, home instruction qualifies as a private school.

1. Constitutional Challenges

The argument that there is a constitutional right to instruct one's

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117. *See supra* notes 50-61 and accompanying text.
118. *See supra* note 82 and accompanying text.
119. *See supra* notes 71-82 and accompanying text.
120. *See supra* notes 108-16 and accompanying text.

child at home has been unsuccessfully advanced in a number of cases within the no-exception category.[121] The Supreme Court dictum in *Pierce*, stating "[n]o question is raised concerning the power of the State . . . to require that all children of proper age attend some school,"[122] continues to hold sway. Since *Pierce*, courts have either not reached the constitutional question[123] or have rejected the argument that parents have a nonreligious constitutional right to instruct their children at home.[124] Only one case, an unreported 1980 Michigan decision, has succeeded on the basis of a first amendment religious claim. In *State v. Nobel*,[125] the court, applying the *Yoder* balancing process, concluded the state's interest in uniformity was not sufficiently compelling to justify enforcement of the compulsory school attendance laws against the defendants.[126]

2. Does Home Instruction Qualify as a Private School?

In the jurisdictions that expressly require attendance at either public or private schools, the primary question has been whether home instruction qualifies as a private school. The courts have split about equally on this issue. One group of decisions has interpreted private

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121. For modern decisions that discussed and rejected this argument, see Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974). *See also supra* text accompanying notes 98-104. For older decisions which rejected the constitutional argument out of hand, see State v. Peterman, 33 Ind. App. 6, 70 N.E. 550 (1904); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed and cert. denied*, 389 U.S. 51 (1967) (might have been decided differently after *Yoder*, particularly in that the defendants were an Amish community); State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929); Shoreline School Dist. No. 412 v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1960), *cert. denied*, 363 U.S. 814 (1960) (defendants claimed religious freedom as members of the Seventh Elect Church in Spiritual Israel). *But cf.* Peirce v. New Hampshire State Bd. of Educ., 122 N.H. ___, ___ A.2d ___ (1982) (dictum in special concurring opinion suggests there is some judicial support for the proposition that parents have a fundamental right to control the education of their children, and such right does not require that attendance be confined to approved schools. Mentioning such home-educated luminaries as Abraham Lincoln, Woodrow Wilson, and Thomas Edison, the two concurring Justices implied that home instruction, as an enduring American tradition, deserved a broad fourteenth amendment due process protection. The concurring Justices were critical of the majority for framing the decision on procedural due process grounds and reversing the local school board's denial of a home education application on those grounds alone). *See infra* note 267.

122. 268 U.S. at 534.

123. *See, e.g.*, People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950):

> As we have concluded that appellants' conviction cannot be sustained upon the evidence, it becomes unnecessary to consider the further contention that the statute violates the constitutional right of parents to direct the education of their child.

Id. at 579, 90 N.E.2d at 216.

124. *See supra* note 121.

125. Nos. S791-0114-A, S791-0115-A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980). *See supra* notes 82-86 and accompanying text.

126. Nos. S791-0114-A, S791-0115-A at 7-9.

school narrowly to not include home instruction. The other group has interpreted private school broadly and liberally to include home instruction. Within this latter group, the courts have required that home instruction must nevertheless be equivalent to the instruction offered in the public schools.

One of the earliest cases to interpret private school narrowly was *State v. Counort*,[127] decided in 1912. In *Counort*, the defendant was convicted for refusing to allow his two children to attend a local public school or an approved private school, as required by Washington's compulsory attendance statute. The father appealed, claiming he was experienced as a teacher, capable of teaching all branches required to be taught in the public schools, and that he maintained a private school at home for his daughters. The Washington Supreme Court rejected his appeal, finding the evidence did not show the appellant maintained a private school at his home.[128] Commenting on the distinction between home instruction and a private school, the court stated:

> Such a requirement means more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws of this state . . . . The parent who teaches his children at home, whatever be the reason for desiring to do so, does not maintain such a school.[129]

For home instruction to be acceptable under this interpretation, it would seem to have to become so institutional in character as to lose any intimate, homelike quality.

The rationale for denying home instruction a private school status was sharpened and tightened in the oftcited[130] 1929 case of *State v. Hoyt*.[131] As in *Counort*, the appellants claimed they were maintaining private schools at their homes and therefore were not in violation of the state compulsory school attendance law.[132] The appellants' children

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127. 69 Wash. 361, 124 P. 910 (1912).

128. *Id.* at 364, 124 P. at 912.

129. *Id.* at 363-64, 124 P. at 911-12.

130. *See, e.g.*, People v. Turner, 121 Cal. App. 2d Supp. 861, 867, 263 P.2d 685, 688 (1953), *appeal dismissed*, 347 U.S. 972 (1954); *In re* Davis, 114 N.H. 242, 244, 318 A.2d 151, 152 (1974); State v. Massa, 95 N.J. Super. 382, 389, 231 A.2d 252, 256 (Morris County Ct. 1967); Stephens v. Bongart, 15 N.J. Misc. 80, 83-84, 189 A. 131, 133 (Essex County Ct. 1937); Akron v. Lane, 65 Ohio App. 2d 90, 93, 416 N.E.2d 642, 644 (1979); Rice v. Commonwealth, 188 Va. 224, 237 n.1, 49 S.E.2d 342, 348 n.3 (1948).

131. 84 N.H. 38, 146 A. 170 (1929).

132. New Hampshire's 1927 compulsory attendance statute provided that the only substitute for public school attendance was attendance at an approved private school. The current statute offers a limited equivalence type exception for cases where parents show a "manifest educational hardship." *See supra* statutory table accompanying note 17.

were instructed in their homes by private tutors, in the courses required to be taught in the public schools to children of their age. Affirming the convictions, the New Hampshire Supreme Court rejected the contention that such instruction qualified as a private school.[133]

According to the *Hoyt* court, home instruction could not be comparable to school—*qua* institutional—instruction because it necessarily lacked the socialization a child would acquire in the group learning experience.[134] The rationale that home instruction is inherently inadequate because of the absence of socialization has been used by courts in a number of subsequent cases to rule that home instruction cannot qualify as a private school.[135] The *Hoyt* court also reasoned that home instruction would place an unreasonable administrative burden on the state to supervise the various home learning experiences and therefore could not qualify as a private school.[136] This administrative rationale has been infrequently relied on by courts.[137]

Although a socialization rationale has not been frequently followed in modern decisions, it was at least implicit in the Kansas Supreme Court's 1963 decision in *State v. Lowry*.[138] The only question before the *Lowry* court was whether the defendants' home instruction program constituted a private school and therefore exempted them from the compulsory school attendance law.[139] Affirming the convictions, the court concluded the defendants were not operating a private school.

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133. 84 N.H. at 42, 146 A. at 172.

134. *Id.* at 40-41, 146 A. at 170-71. In a cryptic explanation on the importance of socialization, the court, quoting from an earlier case, stated:

> The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen. The object of our school laws is not only to protect the state from the consequences of ignorance, but also to guard against the dangers of 'incompetent citizenship'.

Id. (quoting from Fogg v. Board of Educ., 76 N.H. 296, 299, 82 A. 173, 175 (1912)).

135. *See* Knox v. O'Brien, 7 N.J. Super. 608, 614, 72 A.2d 389, 392 (Cape May County Ct. 1950); Stephens v. Bongart, 15 N.J. Misc. 80, 92-93, 189 A. 131, 137 (Essex County Ct. 1937). *Cf.* State v. Garber, 197 Kan. 567, 571, 419 P.2d 896, 900 (1966), *appeal dismissed and cert. denied*, 389 U.S. 51 (1967) (relied more on the lack of a legislative provision for equivalent instruction than on absence of socialization); State v. Lowry, 191 Kan. 701, 703-04, 383 P.2d 962, 964-65 (1963) (looked more to legislative history of statute than to absence of socialization in concluding that home instruction was not equivalent); Shoreline School Dist. No. 412 v. Superior Court, 55 Wash. 2d 177, 181-82, 346 P.2d 999, 1002 (1960), *cert. denied*, 363 U.S. 814 (1960) (based more on the mother's lack of a teaching certificate and what was "best for the child" than on an absence of socialization). For a comprehensive analysis of the distinctions between these cases, see L. KOTIN & W. AIKMAN, *supra* note 11, at 155-66.

136. 84 N.H. at 41, 146 A. at 171.

137. *See* People v. Turner, 121 Cal. App. 2d Supp. 861, 867, 263 P.2d 685, 688 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

138. 191 Kan. 701, 383 P.2d 962 (1963).

139. *Id.* at 702-03. 383 P.2d at 963-64. An earlier Kansas statute had expressly provided for home instruction; however, that provision was subsequently deleted.

The court based its conclusion on the defendants' failure to fulfill all the statutory curriculum requirements, and on the absence of an appropriate institutional atmosphere. Reasoning similarly to *Hoyt*, the *Lowry* court stated:

> To determine whether or not the defendants were operating a private school, this court will look to the purpose, intent and character of the endeavor. The defendants' school was located in their home. The only pupils were their children. The only grades offered or taught were the ones in which their children were enrolled, and, of course, the instruction did not meet the statutory requirements . . . . When all the facts and circumstances are considered together, the only conclusion that can be reached is that this was not a private school conceived or promoted for the purpose of educating anyone desiring to attend, but is really only scheduled home instruction.[140]

Given the strong inference, if not outright endorsement, of a *Hoyt*-like socialization rationale, it seems unlikely the court's decision would have been different had the defendants satisfied the curriculum requirements. Other courts have similarly construed Category One statutes to preclude instruction at home.[141]

Approximately the same number of courts within the no-exception jurisdictions have interpreted attendance at public or private school broadly, to include home instruction provided it was equivalent to that offered in the public schools. In *State v. Peterman*,[142] the court ruled home instruction[143] qualified as a private school under Indiana's public-or-private-school-only compulsory attendance law.[144] Emphasizing the educational rather than the social aspect of "school," the court stated:

> A school, in the ordinary acceptation of its meaning, is a place where instruction is imparted to the young. If a parent employs and brings into his residence a teacher for the purpose of instructing his child or children, and such instruction is given as the law contemplates, the meaning

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140. *Id.* at 703, 383 P.2d at 964.

141. State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed and cert. denied*, 389 U.S. 51 (1967); Shoreline School Dist. No. 412 v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1960), *cert. denied*, 363 U.S. 814 (1960). In addition to these cases, some decisions in Category Two explicitly or implicitly used the socialization rationale to find that home instruction was not equivalent to the instruction offered in public schools. *See infra* text accompanying notes 175-76.

142. 32 Ind. App. 665, 70 N.E. 550 (1904).

143. In *Peterman*, the defendant's child was instructed regularly every school day at the home of a certified teacher who was not the child's parent. The teacher did not advertise herself as operating a private school nor did she have fixed tuition, equipment, or any other students. The teacher was found competent, and her student was instructed in the required courses for the required period of time. *Id.* at 666-68, 70 N.E. at 550-51.

144. *Id.* at 669-70, 70 N.E. at 551. Indiana at the time had a Category One statute, whereas now it is a Category Two jurisdiction. *See supra* statutory table accompanying note 17.

> and spirit of the law have been fully complied with . . . . We do not think the number of persons, whether one or many, make a place where instruction is imparted any less or more a school.[145]

Almost fifty years later, the Illinois Supreme Court applied the *Peterman* reasoning in *People v. Levisen.*[146] This case perhaps best illustrates a broad interpretation of "private school" to include home instruction. Convicted under Illinois' public-or-private-school-only compulsory attendance law, the Levisens appealed, claiming the state had failed to prove their child was not attending a "private school" within the intent of the legislation. The Levisens, Seventh Day Adventists, were instructing their seven-year-old daughter at home because they believed instruction with other children produced a competitive, "pugnacious" character, and that the public school atmosphere was not conducive to fostering faith in the Bible. They also believed that for the first eight or ten years of life, the field or garden was the best schoolroom, the mother the best teacher, and nature the best lesson book. Motives aside, the evidence indicated the Levisen's daughter was receiving equivalent or superior instruction at home for five hours a day in all the required courses, and that she showed a proficiency comparable to her third grade peers.[147]

Reversing the convictions, the court agreed with appellants' contentions that a school is a place where instruction is imparted; its existence is not dependent on the number of persons being taught. The court also noted "[t]he object is that all children shall be educated, not that they shall be educated in any particular manner or place."[148] According to the majority in *Levisen,* academic training, not the development of social skills, was the *sine qua non* of school. The dissent, referring to the *Counort* decision, argued that allowing home instruction would thwart the legislature's intent and would "do violence to the letter and the spirit of the law."[149]

While the *Levisen* court held that home instruction would qualify under the Illinois statute, it emphasized the decision "[did] not imply that parents may, under a pretext of instruction by a private tutor or by the parents themselves, evade their responsibility to educate their children."[150] A sound education was still a prerequisite, the court noting:

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145. 32 Ind. App. at 669-70, 70 N.E. at 551.
146. 404 Ill. 574, 90 N.E.2d 213 (1950).
147. *Id.* at 575-76, 90 N.E.2d at 214-15.
148. *Id.* at 576-77, 90 N.E.2d at 215.
149. *Id.* at 579, 90 N.E.2d at 216 (Simpson, J., dissenting).
150. *Id.* at 578, 90 N.E.2d at 215.

> Those who prefer [home instruction] as a substitute for attendance at the public school have the burden of showing that they have in good faith provided an adequate course of instruction . . . commensurate with the standards prescribed for the public schools . . . .[151]

The court did not clarify what this burden entailed.

In 1974, the federal district court in *Scoma v. Chicago Board of Education*[152] reasserted *Levisen's* holding that home instruction could, so long as commensurate with public school standards, qualify as a private school.[153] However, the court balked at going beyond *Levisen*, rejecting the plaintiffs' contention that home instruction was a fundamental constitutionally protected right.[154]

Scoma is the latest judicial word, albeit dicta, on whether home instruction qualifies as a private school under a statute that requires attendance at either a public or an approved private school.[155] Overall, Category One cases reflect a clear and almost equal split between the *Levisen/Scoma* view and the *Hoyt* position. This issue is replayed in the equivalency context in Category Two cases.

C. *Category Two Cases: "Equivalency" Statutes*

Cases dealing with Category Two statutes greatly outnumber the cases occurring under either Categories One or Three. In part, the large number of cases is directly attributable to the inherent ambiguity of Category Two statutes. The larger number of cases may also be explained by the adoption of this type of statute in many of the more populous states.[156] These statutes do not expressly limit instruction to public or private schools, nor do they expressly provide for home instruction. Rather, the statutes provide an exemption from public school attendance in ambiguous terms like "equivalent instruction elsewhere."

Other commonly occurring issues include: What standards are employed to measure equivalence?, Who has the burden of proving equiv-

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151. *Id.*

152. 391 F. Supp. 452 (N.D. Ill. 1974).

153. *Id.* at 460.

154. *Id.* at 461. *See supra* notes 98-101 and accompanying text.

155. A more recent word on this issue comes from South Dakota. Without actually deciding the defendant's home tutoring of her children qualified as a school within South Dakota's compulsory school attendance law, a trial court reportedly concluded that since there was no definition of school in the statute, so long as instruction was occurring the defendant could not be in violation of the law. A somewhat novel approach to this issue, the judge's refusal to interpret the word "school" reportedly led the South Dakota Legislature to change the law relating to attendance of school age children in unaccredited schools. Telephone conversation with Thomas Harmon, Assistant Attorney General, Department of Education and Cultural Affairs, South Dakota (July 16, 1982).

156. California, Massachusetts, New Jersey, and New York, among other states, have statutes that come within the Second Category. *See supra* statutory table accompanying note 17.

alence, the state or the parent?, Who determines equivalence, the court or school authorities? In addition, constitutional challenges have frequently occurred in Category Two cases.

1. Does Home Instruction Constitute "Equivalent Instruction Elsewhere"?

Because of the ambiguity of statutory language like "equivalent instruction elsewhere," courts have not always concluded that home instruction is a permitted exemption in jurisdictions with this type of compulsory attendance statute. Although a majority of courts have held home instruction qualifies under the equivalence exemption,[157] a substantial minority, adopting the socialization rationale of *State v. Hoyt*,[158] have concluded home instruction is not, nor could it be, equivalent to the institutional, group learning experience.[159]

Commonwealth v. Roberts,[160] an 1893 Massachusetts case, was probably the earliest case in which the equivalence issue was discussed. Reversing the conviction of the defendant, Frank Roberts,[161] the Massachusetts Supreme Judicial Court interpreted the statutory language "otherwise instructed for a like period of time in the branches of learning required by law"[162] to include equivalent instruction offered in other than a public or approved private school.[163] Although the defendant's daughter was instructed in a private unapproved school, the court recognized the right of parents to instruct their child at home so long as the education was equivalent and offered in good faith.[164] In construing the statutory exemption broadly, the court reasoned the goal of the law was that "all the children shall be educated, not that they shall be educated in any particular way."[165] The *Roberts* academic-only interpretation of this type of statute reflects the majority view,

157. *See* Commonwealth v. Roberts, 159 Mass. 372, 34 N.E. 402 (1893); Perchemlides v. Frizzle, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978); State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967); People v. Turner, 277 A.D. 317, 98 N.Y.S.2d 886 (1950). *Cf.* State v. Vaughn, 44 N.J. 142, 207 A.2d 537 (1965); Sheppard v. State, 306 P.2d 346 (Okla. 1957); Wright v. State, 210 Okla. Crim. 430, 209 P. 179 (1922).

158. *See supra* note 134 and accompanying text.

159. *See* Knox v. O'Brien, 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct. 1950); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (Essex County Ct. 1937). *Cf. In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); People v. Turner, 121 Cal. App. 2d Supp. 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

160. 159 Mass. 372, 34 N.E. 402 (1893).

161. Reflecting early social mores, many of the earlier prosecutions were directed solely at the father.

162. 159 Mass. at 374, 34 N.E. at 402.

163. *Id.*, 34 N.E. at 403.

164. *Id.*

165. *Id.*

although a substantial minority of courts have followed the *Hoyt* rationale.[166]

The judicial evolution of this issue is clearly reflected in a series of decisions in New Jersey. Interpreting the statutory language, "equivalent instruction elsewhere than at public school," New Jersey courts have come up with completely opposite conclusions. In the two older cases, *Stephens v. Bongart*[167] and *Knox v. O'Brien*,[168] the language was interpreted to require an equivalence not only in terms of academic input but also in terms of social development.[169] In a more recent case, *State v. Massa*,[170] decided in 1967, the court expressly rejected the *Bongart-O'Brien* reasoning and interpreted the same language to require only academic equivalence.[171] In another relatively recent decision, the New Jersey Supreme Court in *State v. Vaughn*,[172] implied that home instruction could qualify as an exemption from public school attendance.[173]

In *Bongart*, the trial court found the parents to be disorderly persons for instructing their two sons at home rather than sending them to school as required by law.[174] While the evidence indicated the Bongarts' home instruction was not academically comparable to that offered in the public school, the judge preferred to rest his decision on the broader basis of the inherent lack of equivalence of home instruction, stating:

> I incline to the opinion that education is no longer concerned merely with the acquisition of facts . . . . A primary objective of education today is the development of character and good citizenship. Education must impart to the child the way to live. This brings me to the belief that . . . *it is almost impossible for a child to be adequately taught in his home. I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any man-*

166. *See supra* notes 157-59 and accompanying text.

167. 15 N.J. Misc. 80, 189 A. 131 (Essex County Ct. 1937).

168. 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct. 1950).

169. *Id.* at 614, 72 A.2d at 392; 15 N.J. Misc. at 92-93, 189 A. at 137.

170. 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967).

171. *Id.* at 390, 231 A.2d at 257. Where the statute provides for social growth, the result presumably would differ. *See supra* statutory table accompanying note 17, at Idaho.

172. 44 N.J. 142, 207 A.2d 537 (1965).

173. Without specifically holding that home instruction was an exemption, the *Vaughn* court was careful to interpret the New Jersey compulsory education statute to permit the parent to elect to substitute either a day school in which equivalent instruction was given or to instruct the child equivalently elsewhere. The burden was placed upon the parent to introduce evidence that either option was being satisfied. *Id.* at _, 207 A.2d at 540. *See infra* text accompanying notes 230-32. *See generally* Punke, *supra* note 11, at 77.

174. 15 N.J. Misc. at 92-93, 189 A. at 137.

ner or form comparable to that provided in the public school.[175]

The trial court in *O'Brien* reiterated and elaborated upon the view expressed in *Bongart* that home instruction could not be equivalent to an institutional group-learning experience. Holding the defendant guilty of being a disorderly person for instructing his two children at home and not sending them to school, the court explained:

> The underlying philosophy of modern life is that people, through social intercourse with one another, shall live in amity, and to absorb unto ourselves that which is good in our neighbor, and to shun that which is bad . . . .
>
> . . . Research discloses that even the siblings of royalty were encouraged under supervision to have contact with the commoner.
>
> The entire lack of free association with other children being denied to Mark and Eileen, by design or otherwise, which is afforded them at public school, leads me to the conclusion that they are not receiving education equivalent to that provided in the public schools in the third and fifth grades.[176]

This rhapsodic view of the benefits of public school socialization was apparently not shared by the Massas, who removed their daughter from public school and instructed her at home. Fined $2,490 by a local magistrate for failing to comply with New Jersey's compulsory school attendance law, the Massas appealed and were granted a trial *de novo*. As framed by the court, the central issue in this case was equivalence; specifically, what the word "equivalent" meant in the context of the New Jersey statute.[177] Unequivocally rejecting the earlier interpretation of the statute, the *Massa* court said:

> [T]he . . . [*O'Brien* court] interpreted the work [sic] 'equivalent' to include not only academic equivalency but also the equivalency of social development. This interpretation appears untenable in the face of the language of our own statute and also the decisions in other jurisdictions.[178]

Interpreting the New Jersey statute as requiring only academic equivalence, the *Massa* court ruled home instruction was permissible.[179] Based on the evidence presented, the court found the defendants' home instruction program was academically equivalent, in large part because the state had failed to prove the reverse,[180] and overturned the

175. *Id.* (emphasis added).
176. 7 N.J. Super. at 614, 72 A.2d at 392.
177. 95 N.J. Super. at 384, 390-91, 231 A.2d at 253, 257.
178. *Id.* at 387, 231 A.2d at 255.
179. *Id.* at 391, 231 A.2d at 257.
180. *See infra* text accompanying note 237.

municipal court's conviction. The view expressed by the *Massa* court that "equivalent instruction elsewhere," or other such language, refers only to academic equivalence has been, by a narrow margin, the favored and more recent view.[181]

2. What Standards Are Employed to Measure Equivalence?

Once home instruction has been accepted as an alternative, the issue frequently shifts to what standards or criteria are used to measure equivalence. Generally, courts are guided by their state's statute if it sets out standards for determining equivalence. As summarized in the statutory table, those provisions vary from a single requirement, such as teacher qualifications, to a much more elaborate and detailed set of standards.[182]

One of the standards most frequently at issue in determining the equivalence of home instruction programs has been that of teacher qualifications. Where the statute has not provided a teacher qualification standard, courts have usually implied a requirement of teacher competence but not teacher certification. For instance, in *State v. Massa*,[183] the court refused to require that Mrs. Massa have state certification.[184] In fact, the court was satisfied that Mrs. Massa, who did most of the instruction, was qualified to teach her daughter the basic subjects from grades one to eight even though her formal education did not go beyond high school, and even though she had no prior teaching experience. The judge concluded that Mrs. Massa was a competent teacher based on his observation of her while testifying and during oral argument.[185]

Other courts, applying open-textured statutory provisions like New Jersey's, have similarly implied that teacher competence, and not teacher certification, was all that was required.[186] For instance, in New York, where the statute only called for teacher competence, a series of decisions involving the qualifications of the teacher have held the standard did not demand teacher certification.[187]

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181. *See supra* notes 157-59 and accompanying text.

182. *See supra* statutory table accompanying note 17.

183. 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967).

184. *Id.* at 389, 231 A.2d at 256. In *Massa*, the court interpreted a New Jersey statute that simply required "equivalent instruction elsewhere" without any elaboration as to teacher certification or competence.

185. *Id.* at 391, 231 A.2d at 257.

186. *See, e.g.*, Commonwealth v. Roberts, 159 Mass. 372, 34 N.E. 402 (1893); Perchemlides v. Frizzle, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978).

187. *See In re* Franz, 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977); People v. Turner, 277 A.D. 317, 98 N.Y.S.2d 886 (1950); *In re* Falk, 110 Misc. 2d 104, 441 N.Y.S.2d 785 (Fam. Ct. 1981); *In re* Lash, 92 Misc. 2d 642, 401 N.Y.S.2d 124 (Fam. Ct. 1977); *In re* Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974); *In re* Foster, 69 Misc. 2d 400, 330 N.Y.S.2d 8 (Fam.

When the statute specifies teacher qualifications, however, courts have scrupulously followed the statutory requirement.[188] For example, in *State v. Moorhead*,[189] the defendants contended it was unclear whether the term "certified teacher" meant the teacher must be "certified" by a licensing agency or merely "competent." Summarily dismissing the argument, Iowa's Supreme Court referred the defendants to the certification requirement established by the board of public instruction, and stated, "[t]he term should cause no difficulty for citizens who desire to obey the statute."[190]

In addition to teacher qualifications, a number of other factors have influenced courts in determining the equivalence of a home instruction program. As with teacher qualifications, where there are specific statutory standards, courts have tended to apply them rigorously. For instance, in New York, the statute allows for education elsewhere so long as it is "substantially equivalent" to that offered in the public schools. New York courts have generally been quite strict in applying the statutory standards that, in addition to teacher competence, provide for days of attendance, daily hours of instruction, and the subjects to be covered.[191] Thus, in *In re Franz*,[192] the court was sympathetic to the motives and intentions of Mrs. Franz, but was not swayed by them and concluded her home instruction program was inadequate.[193] Tactfully sidestepping the question of Mrs. Franz's competence to teach, the court found her home instruction not substantially equivalent to that offered in the public schools because she only instructed her two children for one-and-a-half hours a day, as opposed to the five hours of daily instruction in the public schools, and because the subjects she covered were determined by the children's interests rather than New York's education law.[194]

Sincerity and good intentions were also not enough in *In re Thomas H.*[195] Convicting the defendants of neglect for failing to send

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Ct. 1972). *Cf. In re* Richards, 166 Misc. 359, 2 N.Y.S.2d 608 (Fam. Ct. 1938), *aff'd*, 255 A.D.2d 922, 7 N.Y.S.2d 722 (1938). *Richards* was not based on the competence of the mother to teach, but on her motives in removing her daughter from school; she believed the long and treacherous walk to the nearest school bus would have been unsafe and unhealthy for her daughter.

188. *But see* State v. Sessions, No. 1-388-C-388 (Iowa Dist. Ct., Winneshiek County, Sept. 8, 1978). *See supra* note 155.

189. 308 N.W.2d 60 (Iowa 1981).

190. *Id.* at 64.

191. N.Y. EDUC. LAW § 3204(a) (McKinney 1981). *See supra* statutory table accompanying note 17.

192. 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977).

193. *Id.* at 432, 390 N.Y.S.2d at 945.

194. *Id.* at 427, 390 N.Y.S.2d at 942.

195. 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974). For New York cases that seemed to be more responsive to motive and intention, see *In re* Falk, 110 Misc. 2d 104, 441

three of their children to school, placing the children under court order to attend school, and placing the parents on probation for eighteen months, the court applied New York's standards strictly and literally.[196] The sole issue before the court was the academic equivalence of the defendants' home instruction program. Both parents were well educated. The father held two degrees, one an advanced degree in literature, as well as a permanent New York certificate to teach English. The mother had attended college for two years, majoring in English and Science, and subsequently worked as a librarian. The evidence clearly indicated the parents were making a good faith, conscientious effort to train their children in an alternative, if somewhat offbeat, manner; however, the instruction was not systematic. For example, it was admitted that United States and New York history were not given much attention, although numerous field trips were taken to points of historical interest. A psychological evaluation of the three children indicated all three had above average intellectual ability and advanced reading skills. The parents objected to the public schools, maintaining "schools can't touch creativity in our way."[197] The New York court, however, refused to accept what some might consider an ideal and idyllic learning experience. Finding the defendants' home instruction did not satisfy New York's standards, the court concluded it was not substantially equivalent.[198]

Confronted with a general statutory provision like "equivalent instruction elsewhere" without specific standards, courts vary with regard to the specificity and rigor in the enumeration and application of their own interpretation.[199] For example, in *State v. Massa*,[200] the court, while admitting that under a more definite statute with sufficient guidelines the defendants' home instruction might have been found inadequate, adopted its own vague criteria of "sufficient and proper instruction." This criteria included the subject matter covered, the method of teaching, the time devoted to instruction, and the results of achievement tests.[201] The court appeared to be less concerned with teacher

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N.Y.S.2d 785 (Fam. Ct. 1981); *In re* Lash, 92 Misc. 2d 642, 401 N.Y.S.2d 124 (Fam. Ct. 1977) (involved instruction at home to a handicapped child); *In re* Foster, 69 Misc. 2d 400, 330 N.Y.S.2d 8 (Fam. Ct. 1972); *In re* Richards, 166 Misc. 359, 2 N.Y.S.2d 608 (Fam. Ct. 1938), *aff'd*, 255 A.D.2d 922, 7 N.Y.S.2d 722 (1938).

196. 78 Misc. 2d at 419, 357 N.Y.S.2d at 391. Compare *In re* Falk, 110 Misc. 2d 104, 441 N.Y.S.2d 785 (Fam. Ct. 1981).

197. 78 Misc. 2d at 416, 357 N.Y.S.2d at 388.

198. *Id.* at 419, 357 N.Y.S.2d at 391.

199. For an illustration of an intuitive, unspecific approach, see State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955) (private school case).

200. 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967).

201. *Id.* at 391, 231 A.2d at 257.

qualifications, and declared social development an irrelevant criterion.[202]

Perchemlides v. Frizzle,[203] an anomalous and highly publicized home instruction case, illustrates a much more specific and rigorous approach. The Massachusetts statute applied in *Perchemlides* provides an exemption for children who are "otherwise instructed in a manner approved in advance by the superintendent or the school committee."[204] Although the court acknowledged it was outside its purview to set standards for the local school authorities, it nevertheless instructed the school committee to consider certain factors and completely disregard others in evaluating a proposal for home instruction.[205] Factors to be considered were teacher competence (not necessarily certification), the number of hours and days devoted to instruction, subjects taught, adequacy of educational materials, and availability of periodic tests for measuring academic progress.[206] Factors to ignore were the parents' motives, the lack of an identical curriculum to that provided in the public schools, socialization, and the creation of a precedent for future home instruction proposals if the plan was approved.[207] No court has followed the lead of *Perchemlides* in imposing such a specific set of factors upon local school authorities in the absence of statutory direction.

Whatever standards, criteria, requirements, or factors are specified in the statute or identified by the courts, it is clear they play a critical role in determining the equivalence of a home instruction program. Where the statute elaborates standards, courts have, as mentioned, consistently and scrupulously applied them. For jurisdictions with only a general statutory provision and no specific standards, the issue has remained relatively dormant. However, as home instruction becomes an increasingly feasible and popular alternative to public schools, the issue of standards promises to become increasingly important.[208]

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202. *Id.* at 389-90, 231 A.2d at 256-57.

203. No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978). *See supra* notes 108-16 and accompanying text.

204. MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1982). *See supra* statutory table accompanying note 17.

205. No. 16641 at __. Reflecting the overall ambiguity in the opinion, the court did not distinguish between "standards" that could not be set by the court and "factors" that could be set.

206. *Id.* at __.

207. *Id.* at __.

208. *See, e.g.*, Gunnison Watershed School Dist. v. Cox, No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981) (a Category Three home instruction case in which the court specifically set out standards the defendants would have to meet to satisfy Colorado's home study, certified teacher exception).

3. Who Has the Burden of Proof?

Another frequently encountered issue, and one also raised in Category Three cases, is the question of who has the burden of proving equivalence, or the lack thereof, of a given home instruction program.[209] Where the statute specifically allocates the burden of proof, courts have consistently followed the statute's directives. For instance, New York's statute, which places the burden on the parent, has been strictly adhered to in all of the recent home instruction cases.[210]

Though usually not a critical issue in New York cases, the burden of proof was central in a 1981 case, *In re Falk*.[211] The Falks, high school graduates with some technical training but no previous teaching experience, removed their nine-year-old son from school and were instructing him at home. They were philosophically opposed to the group learning experience, viewed the routines and regulations of public school skeptically, and felt public school "over-stimulated" their son. Restating the New York position that "the onus of demonstrating that the home instruction is substantially equivalent falls on the [parents],"[212] the court was satisfied the defendants had sustained that burden. Although doubtful about the defendants' ability to provide substantially equivalent education after the eighth grade, the court concluded that up through the eighth grade they could provide their son with the "minimal education required by law."[213] In at least one

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209. For a far more comprehensive discussion on the issue of who has the burden of proof, see Punke, *supra* note 11.

210. *See In re* Falk, 110 Misc. 2d 104, 441 N.Y.S.2d 785 (Fam. Ct. 1981); *In re* Myers, 203 Misc. 549, 119 N.Y.S.2d 98 (Fam. Ct. 1953). *Cf. In re* Franz, 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977); People v. Turner, 277 A.D. 317, 98 N.Y.S.2d 886 (1950); *In re* Lash, 92 Misc. 2d 642, 401 N.Y.S.2d 124 (Fam. Ct. 1977); *In re* Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974); *In re* Foster, 69 Misc. 2d 400, 330 N.Y.S.2d 8 (Fam. Ct. 1972).

211. 110 Misc. 2d 104, 441 N.Y.S.2d 785 (Fam. Ct. 1981).

212. *Id.* at 109, 441 N.Y.S.2d 789.

213. The court stated:

> [H]is parents saw to it that he studied in a relaxed and informal manner for the periods of time required by law and covered the same subject matter as presented to first graders in the South Lewis School System. His mother had a lesson plan and kept what she called a diary or journal of the educational experience. The family accumulated a children's library of some two hundred books, many of which the child had read. Writing was taught and the boy was encouraged to compose letters to friends and relatives and to relate occurrences. His studies included spelling, use of the English language and other required subjects. Arithmetic was taught by the counting of money and the working with combinations of numbers. The parents utilized grade mathematic workbooks and other training aids such as flash cards and films. The parents took the student on field trips to a farm pond, to the neighbors' sap house, to the Sheriff's Office, to a local historical site, to an art museum, and other places of interest. They planted seeds to demonstrate how plants grew, made weather charts and spent time listening to and singing folk and blue grass music. Hygiene was taught through the preservation of health through natural food, fresh air, sunshine and exercise. In short, the twelve required subjects were covered and as in the public school

earlier New York case where the evidence appeared to be equally persuasive, the court concluded the parents had not sustained their burden of proving substantial equivalence.[214]

Where the statute is silent or ambiguous on the allocation of the burden of proof, court decisions have varied. Some courts have ruled the burden rests on the parents to prove, as an affirmative defense, their home instruction was equivalent to that offered in the public schools.[215] Other courts have insisted that because of the criminal or quasi-criminal nature of the offense, the burden was on the state to prove, beyond a reasonable doubt,[216] that the children were not receiving an equivalent education at home.[217] A third line of cases has divided the burden between the parents and the state.[218]

A number of cases within Category Two have been decided on the basis of who has been allocated the burden of proof. The allocation of the burden of proof was decisive in the 1981 case of *State v. Moorhead*.[219] Convicted for violating Iowa's compulsory attendance law, the defendants appealed, arguing that in a criminal prosecution the state had the burden of proving, beyond a reasonable doubt, both nonattendance and the absence of equivalent instruction at home. The Iowa law exempted from school attendance children "receiving equivalent instruction by a certified teacher elsewhere."[220] The Moorheads, neither of whom were certified, had been instructing their children at home through a correspondence course. Affirming the convictions, the Iowa Supreme Court rejected the contention that the burden rested entirely on the state to prove a lack of equivalence. Instead, the court stated, "[t]he burden of going forward with the evidence [was] on the defendant to show the applicability of a defense."[221] Because the Moorheads failed to introduce any evidence that their home instruction program was equivalent to public school instruction, the court concluded it was irrelevant that the state had also failed to introduce any evidence to the contrary, and thus the state prevailed.[222]

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greater emphasis was put on the three R's.
Id. at 110-11, 441 N.Y.S.2d at 790.

214. *See In re* Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974).

215. *See, e.g.*, State v. Moorhead, 308 N.W.2d 60 (Iowa 1981).

216. Given the criminal or quasi-criminal nature of the charge, the reasonable doubt standard has been applied in most of the home instruction cases, see Punke, *supra* note 11, at 77.

217. *See, e.g.*, Sheppard v. State, 306 P.2d 346 (Okla. Crim. App. 1957); Wright v. State, 21 Okla. Crim. 430, 209 P. 179 (1922).

218. *See* State v. Vaughn, 44 N.J. 140, 207 A.2d 537 (1965); State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967).

219. 308 N.W.2d 60 (Iowa 1981).

220. *Id.* at 61. *See supra* statutory table accompanying note 17.

221. 308 N.W.2d at 63 (citing State v. Morris, 227 N.W.2d 150, 154 (Iowa 1975)).

222. *Id.*

Similarly, where the court has placed the burden of proof on the state and the state failed to meet its burden, the parents have prevailed. For example, in two Oklahoma cases where the burden was on the state to prove both nonattendance and a lack of equivalent instruction at home, the prosecution's failure to prove the latter element was fatal for the state's case. In the earlier decision, *Wright v. State*,[223] the father was charged with neglect for failing to compel his child, as required by statute, "to attend some public or private school, or other school, unless other means of education are provided . . . ."[224] The state did not charge, or attempt to prove, the defendant's child was not receiving some other means of education. In dismissing the state's case, the court stated:

> This information was defective, in that it failed to charge, negatively, that the child attended no other school, and that no other means of education was provided, as incorporated in the statutory definition of the offense. These were not mere matters of defense; they constitute an essential element of the offense, as defined by statute. Where a negative averment is an essential and material part of the description of an offense, such negative averment must be made.[225]

In a more recent Oklahoma case, *Sheppard v. State*,[226] the court reiterated and elaborated upon the reasoning of *Wright*. Convicted for violating the compulsory education law, the defendants appealed, primarily arguing the state failed to prove they were not providing their children with "other means of education," as specified in the law. While the defendants introduced evidence on the instruction of their children at home, the state's witnesses testified almost exclusively about the children's absence from the local public school. As the court observed, the state had apparently made no effort to determine whether another means of education was provided.[227] Stating it was "incumbent upon the prosecution to establish each and every material element of the crime charged and every fact and circumstance essential to the guilt of the accused,"[228] the court found the state had not sustained its burden of proof. Specifically, the state failed to introduce sufficient evidence to show the Sheppards were not providing their children with another means of education that was "adequate and comparable."[229]

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223. 21 Okla. Crim. 430, 209 P. 179 (1922).
224. *Id.*
225. *Id.* at 430-31, 209 P. at 179-80.
226. 306 P.2d 346 (Okla. Crim. App. 1957).
227. *Id.* at 356.
228. *Id.* at 353.
229. *Id.* at 356. The court supplied its own version of an equivalence requirement — "adequate and comparable" — inasmuch as the Oklahoma statute only called for "other means of

Because of the state's failure to satisfy its burden of proof, the defendants' convictions were overturned.

The divided-burden approach is illustrated by the New Jersey Supreme Court's complex ruling in *State v. Vaughn*.[230] Remanding the case for a new trial, the court was Solomon-like in dividing the burden between the parent and the state. The court placed the initial burden upon the state to allege a violation of New Jersey's compulsory attendance law (really only a *pro forma* requirement). Having done so, the burden was shifted rather dramatically onto the parents to introduce evidence that their child qualified under either of the statutory exemptions. As the court reasoned, it was peculiarly within the knowledge of the parents to describe their at-home instruction and, therefore, it was incumbent upon them to introduce evidence that their child was receiving equivalent instruction at home.[231] The court did not thrust the burden onto the parents and leave it there, however. Once the parents introduced sufficient evidence to satisfy their burden of persuasion, the ultimate burden shifted back to the state. As stated by the court:

> If there is such evidence [of equivalent instruction at home], . . . then the ultimate burden of persuasion remains with the State with respect to whether the case comes within the exception, this in accordance with the usual rule applicable in penal cases that the ultimate burden of proof always remains with the prosecution.[232]

The *Vaughn* rationale was also applied in *State v. Massa*,[233] a New Jersey home instruction case. Having determined the intent of the legislature required only academic equivalence, the *Massa* court concluded the only remaining question was whether the defendants provided their daughter with an education equivalent to that available in the public schools.[234] The defendants conducted their own defense and introduced considerable and detailed evidence showing their home instruction was equivalent to the education offered in the public schools. The evidence included: packets of instructional material for basic subjects which were noted to be concise yet comprehensive; textbooks used to supplement the defendants' instructional material; over 100 geography booklets prepared by Mrs. Massa from National Geographic magazines; test scores indicating their daughter to be well above average; and photographs to show the Massa family lived a normal, active,

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education." *Id.*

230. 44 N.J. 142, 207 A.2d 537 (1965).

231. *Id.* at 146, 207 A.2d at 540.

232. *Id.*

233. 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967).

234. *Id.* at 384, 390-91, 231 A.2d at 253, 257.

wholesome life.[235] By contrast, the state's evidence of a lack of academic equivalence was skimpy. The state introduced into evidence six exhibits that included a more up-to-date mathematics text, a list of visual aids, sample daily schedules, and several lesson plans from the local school.[236] The court relied on the allocation of the burden of proof established in *Vaughn,* and found the state had not shown beyond a reasonable doubt that the defendants failed to provide their daughter with an equivalent education.[237]

The state also argued Mrs. Massa was unqualified to teach because she had only graduated from high school and did not have a teaching certificate or any prior experience. The court rejected this argument as inapposite and, from its observation of Mrs. Massa's testimony and oral argument, as inaccurate.[238] Finally, the brunt of the state's case centered on testimony by the school superintendent and his assistant that the Massa child's social development would be stunted by being taught alone in her home. Having rejected social development as a criterion for evaluating equivalence, the court deemed the major portion of the state's evidence to be irrelevant.[239]

4. Who Determines Equivalence?

Related to the burden of proof issue, though less frequently encountered, is the question of who determines equivalence. This issue has been resolved in rather straightforward, literal fashion. Thus, unless the statute provides otherwise, courts have generally determined whether a home instruction program was equivalent. For example, in New Jersey and New York, where the statute does not specify who is to evaluate "instruction elsewhere" for equivalence, the courts have automatically assumed the role themselves.

Where the statute provides that an administrative agency is to evaluate instruction elsewhere for equivalence, courts in at least three jurisdictions have refused to usurp that statutory authority.[240] For example, in *Commonwealth v. Renfrew,*[241] the Supreme Judicial Court of Massachusetts affirmed a judgment against the defendants who had not obtained approval for their home instruction program from the local

235. *Id.* at 384, 231 A.2d at 253.

236. *Id.* at 385, 231 A.2d at 254.

237. *Id.* at 391, 231 A.2d at 257.

238. *Id.*

239. *Id.* at 387, 231 A.2d at 255.

240. *See* Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955); Commonwealth v. Kallock, 27 Pa. D. & C. 81 (1936). *Cf.* State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976) (not specifically a home instruction case).

241. 332 Mass. 492, 126 N.E.2d 109 (1955).

school superintendent or school committee as required by statute.[242] The Renfrews contended they were giving their child equivalent instruction at home and attempted to introduce evidence to that effect. The court refused to even consider the evidence of equivalence, stating "[h]ome education of their child by the defendants without the prior approval of the superintendent or the school committee did not show a compliance with the statute . . . ."[243] Whether the court would allow evidence on equivalence following a disapproval by the local authorities was not addressed.[244]

5. Constitutional Challenges

A number of cases occurring within Category Two jurisdictions have involved constitutional challenges. However, no decision expressly involving home instruction[245] has held that such a statute is unconstitutional. In the three cases involving first amendment free exercise arguments, the courts rejected the parents' contentions. In *Renfrew*[246] the defendants' argument, in part, consisted of a religious claim that, as Buddhists, they had a right to remove their child from school and instruct him at home. The Massachusetts Supreme Judicial Court flatly rejected their argument, stating, "[t]he right to religious freedom is not absolute."[247] In *State v. Moorhead*,[248] the Iowa Supreme Court rejected the defendants' religious claim because they failed to present evidence that their first amendment religious freedom had been infringed by the compulsory education law.[249] It was the absence of a genuine religious claim, however, and not the validity of the first amendment

242. *Id.* at 493-94, 126 N.E.2d at 110. *See supra* note 109 and accompanying text.

243. 332 Mass. at 494, 126 N.E.2d at 111.

244. *But see* Perchemlides v. Frizzle, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978) (held local school authorities' disapproval of a home instruction program was subject to judicial review to ensure the decision was made in good faith and not arbitrarily, and remanded for rehearing).

245. A number of cases that may affect constitutional rights concerning home instruction have involved unapproved private and usually religious schools, and have not been included in this discussion. *See* Kentucky State Bd. for Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980); State v. Donner, 199 Misc. 492, 99 N.Y.S.2d 830 (Fam. Ct. 1950), *appeal dismissed*, 342 U.S. 884 (1951); State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978).

246. 332 Mass. 492, 126 N.E.2d 109.

247. *Id.* at 494, 126 N.E.2d at 111. *Renfrew* was decided nearly twenty years before Wisconsin v. Yoder, 406 U.S. 205 (1972). *See supra* text accompanying notes 50-61 and 65-70. Whether *Yoder* would have produced a different result in this case seems questionable in light of some of the more recent decisions. *See, e.g.*, State v. Riddle, 285 S.E.2d 359 (W. Va. 1981) (Category Three home instruction case wherein *Yoder* found inapplicable to religious interest asserted); State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978) (*Yoder* inapplicable to religious claims of parents in case involving private unapproved religious school).

248. 308 N.W.2d 60 (Iowa 1981).

249. *Id.* at 64.

argument that produced the court's ruling in *Moorhead*.[250]

In contrast to *Moorhead*, an Alabama court, in *Jernigan v. State*,[251] found the appellants had presented sufficient evidence to show a religious interest in home instruction. However, the court dismissed their appeal, concluding their claim did not satisfy the *Wisconsin v. Yoder* criteria.[252] More specifically, the court found the appellants' claim had not "shown that their entire way of life [was] inextricable from their religious beliefs or that public education would substantially interfere with their religious practices" and "that the home education they practice[d] [was] an adequate substitute or replacement" for public school.[253]

Defendants' arguments based on other constitutional theories have been similarly unsuccessful in Category Two cases. In *People v. Turner*,[254] for example, a California appellate court rejected the defendants' main contention that the compulsory education law deprived them of their fourteenth amendment right to determine how and where their child might be educated.[255] Upholding the constitutionality of the California statute, the court stated:

> There can be no doubt that if the statute, without qualification or exception required parents to place their children in public schools, it would be unconstitutional . . . . The statute here, however, . . . does not so provide. It recognizes the right of parents not to place their children in public schools if they elect to have them educated in a private school or through the medium of a private tutor or other person possessing certain specified qualifications.[256]

Other cases, including a subsequent California decision, have similarly upheld the constitutionality of their respective compulsory school attendance statutes.[257]

While most of the nonreligious constitutional challenges have centered on a fourteenth amendment theory that parents have a right or liberty to choose how their children are to be educated,[258] there have

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250. *Id.*

251. 412 So. 2d 1242 (Ala. Crim. App. 1982).

252. *Id.* at 1245. *See supra* note 54 and accompanying text.

253. 412 So. 2d at 1245.

254. 121 Cal. App. 2d Supp. 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

255. *Id.* at 865, 263 P.2d at 687.

256. *Id.*

257. *See* Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982); *In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); State v. Moorhead, 308 N.W.2d 60 (Iowa 1981); Knox v. O'Brien, 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct. 1950); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (Essex County Ct. 1937).

258. *See supra* text accompanying notes 88-116.

been some variations on this argument. For instance, in a recent New York case, the defendant argued, without specifying the constitutional source, the education law impinged upon her guaranty of privacy.[259] As the court observed:

> The rationale of this argument is that [the defendant] holds a sincere moral and philosophical belief that the children can best be taught at home under her sole and individual guidance; and that she should therefore be allowed her own way.[260]

The court rejected this, as well as a second, considerably more abstruse, constitutional argument.[261]

Similarly, in *Moorhead,* the court rejected the defendants' somewhat unusual due process contention "that the language 'equivalent instruction by a certified teacher elsewhere' contained in the last sentence [of Iowa's compulsory education law] is unconstitutionally vague on its face in violation of the fourteenth amendment to the United States Constitution."[262] The *Moorhead* court found the term "certified teacher" not so vague as to inadequately apprise the defendants of what the law expected of them.[263]

A considerably different fourteenth amendment argument was successfully advanced in a recent Massachusetts case. The court in *Perchemlides v. Frizzle,*[264] held that once a right to home instruction was recognized under state law, parents were constitutionally entitled to "a high level of procedural due process protection from arbitrary, capricious, or even malicious conduct on the part of the authorities who are authorized to evaluate and decide on the equivalence of a given program."[265] Such protection ranges from ample notification to a fair and open hearing where certain "factors" are to be considered and others ignored.[266] In *Perchemlides,* the court found the parents had not

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259. *In re* Franz, 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977). *See supra* text accompanying notes 94-97.

260. 55 A.D.2d 429, 390 N.Y.S.2d at 943.

261. The defendants argued that compulsory education had become so debased as to be merely compulsory attendance. As such, it was unresponsive to the purposes and intentions of the legislature and, therefore, must be set aside as unconstitutional. *Id.* at 431, 390 N.Y.S.2d at 944. This theory, albeit interesting, is unlikely to be accepted.

262. 308 N.W.2d at 63. *See supra* text accompanying note 250.

263. 308 N.W.2d at 64.

264. No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978).

265. *Id.* at __. The court rooted this due process protection in both fourteenth amendment liberty and property interests.

266. *Id.* at __. While a formal, trial-type proceeding was not required, or even found desirable, the court did outline certain procedures incumbent upon the local school authorities in evaluating a proposed home instruction program. The principal procedural protections were: prior notice of the purpose and subject matter of the hearing in reasonable detail; the right to call and examine witnesses; the right to counsel; a neutral and detached hearing body; some transcription

been provided the necessary procedural protections and, therefore, the court ordered a new hearing by the local school authorities that would follow the court's procedural directives.[267]

D. Category Three Cases: "Explicit" Statutes

A far smaller number of cases than in either of the previous two categories have been decided in jurisdictions with Category Three statutes.[268] The smaller numbers may in part be explained by the relative absence of ambiguity in the statutes. Home instruction is expressly provided for; thus, its very legitimacy is not in issue. In addition, as an examination of the statutory table reveals, the jurisdictions that have adopted the home instruction exemption are generally among the less populous states.[269]

Three issues have been prevalent in Category Three cases. The most commonly raised issue, the burden of proof, was also notable in Category Two cases. Another recurring issue echoes an issue from Category One cases, namely, whether home instruction constitutes a private school. A third issue, reminiscent of the Category Two question, "Who determines equivalence?," has developed where the parents have failed to comply with an express statutory requirement that home instruction be approved by state or local school authorities. As presented to the courts, the question has become whether the failure to strictly follow the technical requirements of the statute precludes an assessment on the merits of the home study program.

In addition to these three common questions, constitutional issues have been raised in a few cases. Not surprisingly, given that home instruction is explicitly allowed, there have been only two cases in which a constitutional issue has played a significant role in these court

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of a record; compliance with public meeting laws; and a specific statement of reasons for a decision to deny approval. The court also insisted that in evaluating the adequacy of a home instruction program, the school authorities would consider certain "relevant" factors and disregard other "irrelevant" factors. *Id.* at __. In addition, the court ruled the denial of a home instruction program was subject to judicial review to ensure the decision was made in good faith and not otherwise arbitrary or capricious.

267. *Id.* at __. The major procedural flaws the court found were that the school authorities did not properly notify the parents of what was expected of them, nor did their home instruction program receive a careful and good faith evaluation. *Id. Cf.* Peirce v. New Hampshire State Bd. of Educ., 122 N.H. ___, ___ A.2d ___ (1982) (denial of a home education application by a local school board reversed because state procedures requiring written notification of deficiencies in the program, and an opportunity to correct such deficiencies were not provided). *See supra* note 121.

268. Our research has uncovered 12 decisions in this category in contrast to at least double that number in each of the other categories.

269. *See supra* statutory table accompanying note 17. These states also tend to be in the West, perhaps reflecting a frontier value on individuality reminiscent of Frederick Jackson Turner's thesis. F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).

decisions.[270]

1. Who Has the Burden of Proof?

The allocation of burden of proof has been decisive in a number of Category Three cases, all occurring in Missouri. The most recent case, *State v. Davis*,[271] followed the reasoning and holdings of the two earlier Missouri decisions.[272] Charged with violating the state's compulsory school attendance law, the defendants were convicted solely on the basis of the state's evidence that their son was not regularly attending the local public school. No evidence was presented by the prosecution showing the defendants had failed to provide the child with substantially equivalent instruction at home, nor had the defendants presented evidence showing their son was receiving substantially equivalent instruction at home. The defendants appealed, claiming the burden of proof was on the state, not them. Agreeing with the defendants, the court reversed their convictions, stating:

> Since the allegation that defendants failed to provide their child with proper home instruction was an essential element of the state's case, and since the state failed to prove such element, the convictions cannot stand.[273]

Other courts have placed the burden on the parents; however, in none of these cases was the burden of proof the decisive issue.[274]

2. Does Home Instruction Constitute a Private School?

Whether home instruction constitutes a private school has been an issue in a significant number of Category Three cases. Like the argument surrounding the same issue in Category One cases,[275] parents have contended their home study program was not home instruction, but a private school. Unlike Category One cases,[276] the purpose of the argument has been to avoid statutory requirements (usually teacher certification) that in some states are placed on the home instruction exemption but not placed on private schools. For the most part, states

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270. *See infra* notes 303-12 and accompanying text.

271. 598 S.W.2d 189 (Mo. Ct. App. 1981).

272. State v. Pilkinton, 310 S.W.2d 304 (Mo. Ct. App. 1958); State v. Cheney, 305 S.W.2d 892 (Mo. Ct. App. 1957).

273. 598 S.W.2d at 191.

274. *See* Gunnison Watershed School Dist. v. Funk, No. 81-JV-3 (Colo. Dist. Ct., Gunnison County, Dec. 30, 1981); T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948).

275. *See supra* notes 127-54 and accompanying text.

276. In Category One cases, the argument was used to bring home instruction into the ambit of the statute and thereby include it as a permitted exemption from public school attendance. *See supra* text accompanying notes 127-54.

have successfully argued the parents were conducting home instruction under the guise of a private school with the sole intent of evading the statutory requirements.[277]

This issue was decisive in *T.A.F. v. Duval County*.[278] The appellate court affirmed the lower court's judgment that the appellants, two minors, were truants and in need of supervision because they were not being educated as required by Florida law.[279] Withdrawn from school because of their parents' religious belief that race mixing was sinful, the appellants were being instructed at home in what their parents characterized as a church school. The court perfunctorily dismissed any claim of a bona fide religious interest, stating:

> It appears too clear to us that the educational instruction received by appellants in their home through instructions given by their mother does not comply with the provision of the statute regarding instruction at home with a private tutor who meets all prescribed requirements of law. It is equally clear that the Ida M. Craig Christian Day School attended by appellants is neither a parochial nor denominational school within the generally accepted meaning of those terms.[280]

In a subsequent Florida decision, the court reached a result identical with, but independent of, *Duval*. In *State v. M.M. and S.E.*,[281] the appellate court reversed a lower court judgment that had found the appellee-children were not truants because they were being educated in a private school at home. Concluding instruction at home by an uncertified teacher was not a private school, the court noted home instruction and private schooling were interrelated, though distinct, statutory exemptions.[282] While home instruction had some requirements, there was a "virtual absence of any statutes or administrative rules regulating non-public schools."[283] The court reasoned the legislature would not have established two such distinct exemptions, with separate requirements, unless it intended them to be mutually exclusive.[284] To not read the exemptions as mutually exclusive would have undermined the legislative intent.[285]

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277. *But cf.* State v. Nobel, Nos. S791-0114-A, S791-0115-A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980) (a Category One case that held primarily on first amendment religious grounds that the defendants' at-home instruction constituted a private school). *See supra* notes 82-86 and accompanying text.

278. 273 So. 2d 15 (Fla. Dist. Ct. App. 1973).

279. *Id.* at 18.

280. *Id.* at 19.

281. 407 So. 2d 987 (Fla. Dist. Ct. App. 1981).

282. *Id.* at 990.

283. *Id.*

284. *Id.*

285. *Id.*

The validity of home study as a private school was also the central issue in an unreported 1981 Colorado decision. In *Gunnison Watershed School District v. Funk*,[286] the parents had removed their child from school and were instructing her at home because bus service had been discontinued to the child's remote, rural residence. The parents, neither of whom were state certified teachers, purchased a correspondence course from the Christian Liberty Academy and applied for permission to teach their daughter at home pursuant to Colorado's two-pronged home instruction provision.[287] For a number of reasons, none of which involved the lack of certification, the state board of education denied their request.[288] Subsequently, the Funks declared they were operating a private satellite school under the name "Funk's Christian Liberty Academy."[289] As observed by the court, there was only one child enrolled in the program, Naomi Funk, and instruction was given by her mother in one room of their house. Much like *M.M. & S.E.*, the *Funk* court concluded:

> In adopting the exemptions from compulsory public school attendance, the legislature contemplated situations where education could be provided outside a public school setting—one such situation was instruction in the child's home [according to the statute] and another was instruction in an independent or parochial school [also according to the statute]. Because these two categories were created as separate exemptions, it is reasonable to conclude that the legislature intended its exception for instruction in an independent school to comprehend an educational program *outside* the home. Surely, the legislature did not contemplate that an "independent school" would consist of a parent with a high school education and no teaching experience who attempts to provide all of the academic needs of her own child within her own home, regardless of how well motivated she might be. Such instruction cannot reasonably be considered to be an independent school, but it is plainly and simply a home instruction program.[290]

As these cases indicate, the courts have adamantly refused to blur the statutorily created distinctions between private schools and home

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286. No. 81-JV-3 (Colo. Dist. Ct., Gunnison County, Dec. 30, 1981). *Cf.* Gunnison Watershed School Dist. v. Cox, No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981).

287. *See supra* statutory table accompanying note 17.

288. The reasons given by the state board of education were: (1) there was a lack of stated educational objectives; (2) the proposed reading and language arts texts were either inadequate or inappropriate to the child's grade level; (3) the system of evaluating the child's progress was inadequate; and (4) the procedure establishing the sequence and pace of presentation of materials was inadequate. *Funk*, No. 81-JV-3, at 2.

289. Although there were hints of a religious motive involved in the decision to remove Naomi Funk from school and instruct her at home, no religious claim was raised in the court's opinion.

290. No. 81-JV-3, slip op. at 3-4.

instruction.

3. Is Technical Statutory Compliance Necessary?

A number of cases have been decided on the basis of a failure on the part of parents to comply with a specific requirement for home instruction; usually, approval of their program by state or local school authorities. Typically, the parents have argued that, although they were not in technical compliance with the statute, their home instruction program was equivalent to public school instruction and, thus, not in violation of the compulsory education law.

Courts have uniformly rejected this argument, strictly adhering to the statutory requirements. For instance, in *Akron v. Lane*,[291] the appellate court refused to consider evidence of adequacy where the defendant-parent had not received approval for his home instruction program from the authorized school official.[292] The defendant in *Lane* had removed his hearing-impaired daughter from the public school because he was dissatisfied with her progress in special education classes, and the school district refused to place her in regular classes with the aid of an interpreter. Subsequently, the defendant provided his daughter with instruction at home from a private tutor, allegedly a certified teacher of the deaf. However, the defendant had not obtained the approval of the school superintendent as required by statute. Consequently, he was charged and convicted for violating Ohio's compulsory education law. On appeal, the defendant contended he was providing his daughter with equivalent education at home and therefore was not violating the law. The court summarily dismissed this argument and framed the issue as one of compliance or noncompliance with the specific requirements of Ohio's statute.[293] Affirming his conviction, the court reasoned:

> Mere equivalency between home instruction and public education is not an exception listed in the statute. The allowance of a home instruction exception is discretionary with the district superintendent of schools, subject to state direction . . . and subject to appeal to the Juvenile Court . . . . Whether defendant's home instruction program is equivalent to the education provided by the Akron Board of Education was, therefore, immaterial to the instant prosecution.[294]

Similarly, in *Gunnison Watershed School District v. Cox*,[295] the defendants argued that, regardless of Colorado's statutory require-

291. 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979).
292. *Id.* at 94, 416 N.E.2d at 645.
293. *Id.* at 94-95, 416 N.E.2d at 645.
294. *Id.* at 93, 416 N.E.2d at 644.
295. No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981).

ments, their home instruction program was adequate and therefore, they were in compliance with the law.[296] The court, using reasoning similar to *Lane*, declined to consider the adequacy of the respondents' home instruction program because they had failed to comply with the statutory requirements of either state board approval or instruction on a regular basis by a certified teacher.[297]

In three other cases, a failure to comply with a specific statutory requirement has played a significant, but secondary role. Constitutional issues have played the primary role in these cases; however, once the courts resolved the constitutional questions (in each instance rejecting the defendants' arguments) the issue of noncompliance has then become crucial. For example, the Virginia Supreme Court, in *Rice v. Commonwealth*,[298] ruled "the religious beliefs of the defendants [did] not exempt them from complying with the reasonable requirements of Virginia [compulsory education] laws."[299] The court went on to state:

> Since the defendants made no effort whatever to have their qualifications [as instructors] approved as required by the statute, they are in no position to interpose their instructional efforts as a defense to their clear and admitted violation of the statutory requirements.[300]

The pattern illustrated by *Rice* has been repeated in two other decisions.[301] In both instances the courts first rejected constitutional claims, and then refused to consider the adequacy of the home instruction programs because of a failure to comply with the statutory requirements. Thus, the courts in Category Three cases, like those in Category Two cases,[302] have unequivocally refused to consider the adequacy of home instruction where statutory requirements are not satisfied.

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296. *Cox* is factually similar to *Funk*. In *Cox*, the parents had removed their children from the public school because bus service had been discontinued to their remote, rural home; they had purchased educational material from the Christian Training Academy, a correspondence school in Illinois; they had begun instructing their children at home, although neither was a certified teacher; and they had been charged in a noncriminal action of violating Colorado's compulsory school attendance law. Similarly, the local school authorities had not disapproved of their program nor had they initiated the civil action. Unlike the Funks, however, the Coxes did not claim to be operating a private school, but rather, maintained that their home instruction program was adequate regardless of the state's procedural requirements, which they perceived as technicalities. *See supra* note 286 and accompanying text.

297. No. 81-JV-2 at 3-4.

298. 188 Va. 224, 49 S.E.2d 342 (1948).

299. *Id.* at 234, 49 S.E.2d at 347. *See infra* text accompanying notes 303-07.

300. 188 Va. at 238, 49 S.E.2d at 349.

301. *See* T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981). In the former case, the decisive issue was whether the defendants' home instruction constituted a private school. *See supra* text accompanying notes 278-80.

302. *See supra* notes 240-44 and accompanying text.

4. Constitutional Challenges

Constitutional challenges, other than those based on first amendment religious grounds, have been virtually nonexistent in Category Three cases. The first amendment has played a central role in only two decisions, and in each case the court found the state's interest in compulsory education was superior to the parents' religious interests.

In the first case, *Rice v. Commonwealth*,[303] the Virginia Supreme Court upheld the convictions of the defendants who claimed they were excused from complying with the compulsory education law because of their religious beliefs. The three defendants refused to send their children to public school because of their firm religious conviction that public school would expose the children to unwholesome influences and diseases, and prevent them, as parents, from teaching and training their children as the Bible commanded. Each of the defendants taught his children at home in a rigorous, religiously dominated atmosphere. Although Virginia specifically provided a home instruction exemption, it was subject to the requirement that the instructor be approved by the local school superintendent according to qualifications established by the state board of education.[304] While accepting the sincerity of the defendants' religious beliefs and their religious motives for instructing their children at home, the court refused to accept the argument that such religious interests excused them from complying with the statute's requirements.[305] Readily distinguishing the *Meyer* and *Pierce* decisions,[306] the court stated, "[t]he mere fact that such a claim of immunity is asserted because of religious convictions is not sufficient to establish its constitutional validity."[307]

Whether *Rice* would have been decided differently in light of the Supreme Court's narrow ruling in *Wisconsin v. Yoder*[308] is doubtful, particularly in view of the West Virginia Supreme Court's 1981 decision in *State v. Riddle*.[309] *Riddle* was factually and legally similar to *Rice*. The sincerity of the Riddles' religious motives was not in question, and the quality of their home instruction was admittedly excellent. However, like the defendants in *Rice*, the Riddles had not complied with the statute that allowed home instruction conditioned upon approval by the county superintendent and county board of education. Relying on *Yoder*, the Riddles argued they were not required to comply

303. 188 Va. 224, 49 S.E.2d 342 (1948).
304. *See supra* statutory table accompanying note 17.
305. 188 Va. at 234, 49 S.E.2d at 347.
306. *See supra* notes 32-42 and accompanying text.
307. 188 Va. at 234, 49 S.E.2d at 347.
308. *See supra* notes 50-61 and accompanying text.
309. 285 S.E.2d 359 (W. Va. 1981). *See supra* note 247.

with the statute because of their religious beliefs. The court, however, distinguished *Yoder* on two grounds: (1) the Amish were a self-contained community with a long history, whose children were being equipped—vocationally, socially and spiritually—to exist within that community and not the larger society; and (2) the Amish had sent their children to neighborhood public schools for the first eight grades, which guaranteed the acquisition of sufficient basic skills to provide a foundation for adult life outside of the religious community.[310] While not denying the Riddles presented a legitimate religious claim, the court found, on balance, that the interests of the state in preparing its citizens for a successful life (and conversely, so they would not become drains on the state), decidedly outweighed that religious interest.[311]

With the exceptions of *Rice* and *Riddle,* constitutional issues have arisen only peripherally in other Category Three cases.[312]

SUMMARY AND CONCLUSIONS

Home instruction statutes fall into three general categories. One category consists of 14 states that do not allow an exception for home instruction beyond the possibility of qualifying as a private school. Another category, composed of 21 states, provides an implicit allowance for home instruction with statutory language like "equivalent education elsewhere." A final category consists of 15 states with statutes specifically providing for home instruction. Within these latter two statutory classifications, the substantive grounds for home instruction programs and the procedures for obtaining approval for such programs vary significantly from state to state.

Each statutory category has a corresponding set of cases which cluster around certain identifiable issues. For instance, in Category One, a major issue has been whether home instruction qualifies as a private school. In response to this question, the cases have split almost down the middle.

Category Two, with its inherently ambiguous language, has spawned the greatest amount of litigation, as well as the largest num-

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310. 285 S.E.2d at 361-62.

311. *Id.* at 367.

312. *See* Gunnison Watershed School Dist. v. Funk, No. 81-JV-3 (Colo. Dist. Ct., Gunnison County, Dec. 30, 1981) (summarily rejected contention that statute was so vague as to be unconstitutional); T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973). In summarily disposing of a first amendment challenge, the *T.A.F.* court commented: "For a complete and definitive discussion of what does and does not constitute such a religious belief as will excuse children subject to state compulsory school attendance laws . . . see the decision rendered by the Supreme Court of the United States in the case of Wisconsin v. Yoder." 273 So. 2d at 18. *See also* State v. Davis, 598 S.W.2d 189, 191 (Mo. Ct. App. 1980) (cited fourteenth amendment due process clause in support of ruling that burden of proof is on the state in a criminal prosecution).

ber of distinct issues, including: Does equivalent education elsewhere include home instruction given its lack of social contact?, Do parents have to prove equivalence or does the state have to prove the absence thereof? No clear pattern has emerged in relation to the last question. In response to the first question, the modern view is to disregard socialization and allow home instruction provided it is academically equivalent.

Cases within Category Three have involved a blend of issues from the two other categories. For example, whether home instruction constitutes a private school is a question that reappears, but for a very different reason. In addition, a defense has been proposed by parents that mere technical statutory noncompliance does not preclude adequate home instruction. In response to both issues courts have vigorously enforced the statutory requirements. Where the statute has an explicit exception and specific requirements for home study, courts have adamantly rejected the arguments of parents that home study qualifies as a private school. Similarly, courts have insisted upon compliance with the procedural prerequisites specified in the statute.

Overriding and interrelating these statutory and case divisions are the constitutional parameters of home instruction. The two principal constitutional arguments are based on the first amendment's free exercise clause and the fourteenth amendment's due process clause. In response to first amendment arguments, the vast majority of courts have rejected the religious claims of parents, leaving the Supreme Court's decision in *Yoder* as a narrow springboard to future litigation. Similarly, most courts have rejected the substantive due process arguments of parents, interpreting the Supreme Court's decision in *Pierce* as offering little support for home instruction. Parents relying on these and other constitutional arguments have been successful in only a few cases.

Home instruction reflects a much broader social issue, namely, where the line should be drawn between the needs of the state to promote areas of collective concern and the freedom of individuals to choose on matters of great personal consequence. For these complex questions facing society, ideal answers are difficult. Instead, legal solutions, often arising in response to unclear historical forces, have formed a patchwork answer. An additional reason for this patchwork pattern in the home instruction area is that, because education is a state function, variety is both appropriate and inevitable.

In gathering together a comprehensive survey and systematic analysis of the statutes and cases on home instruction, this article delineates the contours of this patchwork legal solution. In so doing, it provides a perspective for an approach that retains substantial local control and flexibility when weighing the competing interests of the states and par-

ents. This approach is particularly desirable in view of the increasing popularity and feasibility of home study programs.

With the benefit of this comprehensive view of the statutory and judicial experience to date, states should consider providing a limited statutory exception for home instruction and attendant due process procedural protection. Such procedures should include notice, an opportunity for a hearing, and a clear set of standards. Statutory and case law experience suggests such standards include teacher competence, curriculum coverage, time requirements and periodic progress reports (including standardized test data). Socialization would not appear to be an appropriate standard for home instruction. To include it would seem to deny that opportunities for socialization vary within and beyond school settings. Applying these standards in an ad hoc multifactored approach allows an accommodation for local conditions and differing combinations. Reasonable flexibility in applying such standards would be warranted in view of the fact that the tutorial mode of instruction has a significant advantage over typical institutional education.[313]

Finally, the New Jersey approach of burden-shifting seems sensible and proper. Placing the initial, albeit nominal, burden on the state to show nonattendance, and once this is established, putting the burden on the parents to prove equivalence, accurately reflects the reality of the inside knowledge parents have of their home study programs. Shifting the ultimate burden onto the state to prove the child is educationally deprived is appropriate, given the criminal or quasi-criminal nature of most of the actions.

The balanced approach takes account of both the state's interest in education and the parents' freedom to choose. In addition, and perhaps

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313. G. GLASS & M. SMITH, META-ANALYSIS OF RESEARCH ON THE RELATIONSHIP OF CLASS SIZE AND ACHIEVEMENT (1979) (based on sophisticated statistical analysis of nearly 80 separate studies, it was found that approximately thirty percentile ranks exist between the achievement of a pupil taught individually and a pupil taught in a class of 25). In a subsequent study in this nationally funded Class Size and Instruction Project, the researchers also found positive effects on pupil attitudes and motivation. *See* M. SMITH & G. GLASS, RELATIONSHIP OF CLASS SIZE TO CLASSROOM PROCESSES, TEACHER SATISFACTION, AND PUPIL AFFECT: A META-ANALYSIS (1979). Reports of these studies have permeated the educational literature. *See, e.g.*, Cohen & Filby, *The Class Size/Achievement Issue: New Evidence and a Research Plan*, 60 PHI DELTA KAPPAN 492 (1979); Glass, Cohen, Smith, Filby, *Class Size and Learning — A New Interpretation of the Research Literature*, TODAY'S EDUC., Apr.-May 1979, at 42; Smith & Glass, *The Effect of Class Size on What Happens in Classrooms*, 45 EDUC. DIG. 16 (March 1980).

The critique of the Glass-Smith research does not seem to affect the findings regarding the educational efficacy of a truly small educational arrangement (i.e., one to five pupils) in comparison with mid-range classes (i.e., 20 to 40 pupils). *See* EDUC. RESEARCH SERVICE, CLASS SIZE RESEARCH: A CRITIQUE OF RECENT META-ANALYSIS, 62 PHI DELTA KAPPAN 239 (1980). *But see* Glass, *On Criticism of Our Class Size/Student Achievement Research: No Points Conceded*, 62 PHI DELTA KAPPAN 242 (1980).

most importantly, it permits a greater focus on the best interests of the individual child.