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I. The Problem: A Judicial Void

This paper reassesses parental rights and state interests in the education of children. This is a critical issue in the context of home education.[1] First, although the Supreme Court has established the right of parents to choose a private school education in *Pierce v. Society of Sisters*[2], the Court has not directly addressed the issue of home education.[3] Second, there is a significant number of families in the United States educating their children at home; estimates are as high as one million families.[4]

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1. Home education is also referred to as home schooling and home instruction. "Home instruction . . . is distinguishable from an authorized tutorial program in that the child is not educated by a person who is certified to teach under state law". Note, *Home Instruction: An Alternative to Institutional Education,* 18 J. FAM. L. 353, 355 (1979-80).

2. 268 U.S. 510 (1925).

3. Lupu, *Home Education, Religious Liberty, and the Separation of Powers,* 67 B.U.L. REV. 971, 975 (1987); Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child,* 18 WILLAMETTE L. REV. 563, 586 (1982); Tobak & Zirkel, *Home Instruction: An Analysis of the Statues and Case Law,* 8 U. DAYTON L. REV. 1, 19 (1982); Note, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators,* 39 BAYLOR L. REV. 469, 473 (1987); Case Comment, *Constitutional Law — Home Instruction — State Procedural Requirements for Home Instruction Held Not Violative of Fundamental Rights: McDonugh v. Ney,* 599 F. Supp. 679 (D.Me. 1984), 16 CUMB. L. REV. 179, 186-87 (1985); Case Comment, *Constitutional Law — Compulsory School Attendance — Who Directs the Education of a Child?: State v. Edgington,* 14 N. M. L. REV. 453, 458 N.35 (1984); Note, *Missouri Home Education: Free at Last?,* 6 ST. LOUIS PUB. L. REV. 355, 366 (1987); Note, *Home Education in America: Parental Rights Reasserted,* 49 UMKC L. REV. 191, 198 (1981). However, in dicta in *Board of Education v. Allen,* 392 U.S. 236 (1965) the Court stated: "Indeed, the State's interest in assuring that these standards are being met has been considered sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes." *Id.* at 246-7.

4. J. NAISETT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES, 144 (1982) *quoted in,* Note, *Parental Liberties Versus The State's Interest in Education: The Case For Allowing Home Education,* 18 TEXAS TECH. L. REV. 1261 (1987); *see also,* Smith & Klicka, *Review of Ohio Law Regarding Home School,* 14 OHIO N.U.L. REV. 301, 302 (1987). WHITEHEAD & BIRD comment:

Third, because of the absence of Supreme Court case law, states may pass and have passed restrictive compulsory school attendance statutes. Although no current state statute expressly prohibits home education, various restrictive statutes narrowly construed by courts have allowed states to absolutely foreclose home education as a lawful choice for parents.[5] Finally, the consequences of these statutes for parents is not only a denial of choice, but may include a criminal prosecution[6], fines[7], jail sentences[8], and the removal of their children from parental custody[9] for those parents who violate the law.

II. The Question: Is Home Education a Fundamental Right or Not?

The main question of this paper is whether a Constitutionally grounded fundamental right of parental or familial privacy can reasonably be construed to protect home education as a choice by parents. As will be shown, such a right can be found in the privacy penumbra of the Constitution. This proposed fundamental right of privacy protecting parental choice of home education is built on two arguments: A reasonable construction of

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"There is no definite figure on home schools because many families do not want to be studied or counted. Fearing prosecution and harassment from state authorities, a large but uncertain number of parents simply hide their children." HOME EDUCATION AND CONSTITUTIONAL LIBERTIES, 18 (1984).

5. *E.g.*, N.H. Rev. Stat. Ann. § 193:1 (1978), *construed in* Stocklin-Enright, *Constitutionalism and The Rule of Law: New Hampshire's Home Schooling Quandry [sic]*, 8 VT. L. REV. 265 (1983) as:

> [T]he sternest school law in the country. It leaves parents with only two approved options: attendance at either a public or private school. The New Hampshire Supreme Court's interpretation of the "private school" definition adds a further restraint on choice by demanding an institution or group aspect to private schools. Parents wishing to educate their children outside of an institutional format are left with little or no choice in New Hampshire.

6. *E.g.*, Delconte v. State, 308 S.E.2d 898, 901 (N.C. App. 1983); Jernigan v. State, 412 So. 2d 1242, 1243 (Ala. Cr. App. 1982); *see also In re* Franz, 390 N.Y.S.2d 940, 941 (1977) (child neglect conviction, mother placed on one year probation); Case Comment, *Criminal Law; Compulsory Education — Convictions Were Based on Crimes Not Yet Committed Where an Essential Element of the Offense (Failure to Provide 120 Days of Public School Attendance for School Aged Children) Was Completely Omitted from the Charging Instrument — State v. Trucke, 410 N.W.2d 242 (Iowa 1987)*, 37 DRAKE L. REV. 163, 164 (1987-88).

7. *E.g.*, People v. Turner, 263 P.2d 685, 686 (Cal. 1953); State v. McDonough, 468 A.2d 977, 977 (1983), *affirmed*, 481 A.2d 184 (Me. 1984), *complaint dismissed*, McDonough v. Ney, 599 F.Supp. 679 (D. Maine 1984); State v. Hoyt, 146 A. 170, 172 (N.H. 1929); City of Akron v. Lane, 416 N.E.2d 642, 644 (Ohio App. 1979); Sheppard v. State, 206 P.2d 346, 349 (Okl. Crim. App. 1957); City of Akron v. Lane, 416 N.E. 642, 644 (Ohio App. 1979).

8. Jail was threatened in the facts leading to the case of Hanson v. Cushman, 490 F.Supp. 109, 111 (W.D. Mich. 1980); *see also*, Lines, *Private Education Alternatives and State Regulation*, 12 J. L. & EDUC. 189, 189 (1983).

9. Seizure of the children was threatened in the facts leading to the case of Scoma v. Board of Educ., 391 F. Supp. 452, 456 (N.D. Ill. 1974); *see also, In Re* Shinn, 16 Cal. Rptr. 165, 167 (1961) (children declared wards of the court).

existing Supreme Court case law and a reassessment of state interests vis-a-vis the parental right of privacy.

III. A Review and Application of Supreme Court Case Law

A review of Supreme Court case law on parental rights in education can be divided into two time periods: the Lochner-era cases and the one modern era case, *Wisconsin v. Yoder*[10]. It is the combination of these cases, along with the absence of case law in the home education context, that has resulted in free rein by the states in restricting parental choice of home education for their children. However, these cases can form a basis for a reasonable construction of a privacy right of parents to choose home education.

The so-called Lochner-era cases were decided in the heyday of the economic substantive due process approach of the Supreme Court. Even though the Lochner economic liberty theory has been discarded[11], the education cases are useful for two reasons. They continue to be cited as good law on the subject of public school versus private school attendance, the extent of constitutionally permissible regulation of private schools, and the right of parents to choose to send their children to private school.[12] Furthermore, it is well recognized that the privacy penumbra of *Griswold v. Connecticut*[13] and its progeny is a continuance or modification of the substantive due process approach.[14] Thus, the Lochner-era cases are related to the privacy interest cases since *Griswold.*

The first of the Lochner-era trilogy was *Meyer v. Nebraska*[15] where a private tutor was convicted of violating a state law prohibiting the teaching of foreign languages to children of elementary school age. Meyer asserted an economic liberty right to choose a vocation under the due process clause of the fourteenth amendment.[16] The state had argued that it had an interest in creating an enlightened American citizenship "prepared readily to understand current discussions of civic matters"[17] and ensuring an opportunity to "learn English and acquire American ideals."[18] The U.S. Supreme Court held that the statute violated the defendant's right to

10. 406 U.S. 205 (1972).
11. Mangrum, *Family Rights and Compulsory School Laws,* 21 CREIGHTON L. REV. 1019, 1025 (1988).
12. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1319 (1987); Mangrum, *supra* note 11, at 1025.
13. 381 U.S. 479 (1965).
14. Mangrum, *supra* note 11, at 1025.
15. 262 U.S. 390 (1923).
16. *Id.* at 396-7, 399-400.
17. *Id.* at 402.
18. *Id.* at 401.

teach.[19] Although parental rights were not represented in *Meyer,* the Court said that "[the teacher's] right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] amendment."[20]

Meyer served as the basis for the Court's landmark decision two years later in *Pierce v. Society of Sisters*[21]. In *Pierce,* two private schools challenged a state statute which forced parents to send their children to public schools. The Court held that the state law unreasonably interfered with the business and proprietary interests of the private schools.[22] As in *Meyer,* no parent was directly represented, however, the Court stated that the state law "unreasonably interfere[d] with the liberty of parents to direct the upbringing of children under their control."[23] The Court then observed "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[24]

Three years later in *Farrington v. Toshushige*[25], the Court applied the due process clause of the fifth amendment to strike down the federal law in the Territory of Hawaii as too restrictive of private schools in question.[26] The Court rejected the contention that the government's interest in assimilating and indoctrinating aliens with American ideals could operate to totally control private schools and choices by parents. The Court stated that the provisions of the statute went "far beyond mere regulation of privately-supported schools where children obtain instruction deemed valuable by their parents and which is obviously not in conflict with any public interest."[27]

Between the *Farrington* decision in 1927 and *Yoder*[28] in 1972, the Supreme Court did not address the issue of parental rights and state interests in education. Unlike those in the Lochner-era trilogy, the plaintiffs in *Yoder* were parents rather than teachers or private schools. Also unlike the *Meyer-Pierce-Farrington* situations, the parents were seeking to discontinue public education after the eighth grade in favor of a community-based vocational education.

The *Yoder* parents asserted that their religious-based right of choice was

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19. *Id.* at 403.
20. *Id.* at 400.
21. 268 U.S. 510 (1925).
22. *Id.* at 535.
23. *Id.* at 534-5.
24. *Id.* at 535.
25. 273 U.S. 284 (1927).
26. *Id.* at 299.
27. *Id.* at 298.
28. 406 U.S. 205 (1972).

superior to the state's interests. The peculiar facts of *Yoder* together with its limited holding seems to foreclose any secular right of parents to choose an educational alternative beyond public or private school. The plaintiffs in *Yoder* were Old Order Amish who contended that the compulsory school attendance statute interfered with their first amendment rights of free exercise of religion. The Court, in holding in favor of the Amish claim, emphasized the unusual and idiosyncratic character of the Amish religious claim: "[The Amish made] a convincing showing, one that probably few other religious groups or sects could make . . ."[29]

As one commentator puts it: "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."[30]

These "narrowly defined criteria" can be summarized as follows:

> First, the burden placed upon the parents to show constitutionally impermissible interference with their religious beliefs was great. Second, the parents' claim was supported by unchallenged testimony of acknowledged experts in education and religious history. Third, these parents could point to nearly three hundred years of consistent Amish practice and substantial evidence of a sustained faith pervading and regulating the parents entire mode of life.[31]

A recent case demonstrates the narrowness of the *Yoder* decision in the context of religiously motivated parents. In *Duro v. District Attorney*[32], a federal district court overturned a North Carolina prohibition of home education. The court relied on *Yoder* to hold the prohibition violative of the parents' first amendment religious exercise rights. The district court found that the state interests were "little more than an empty concern" and were outweighed by the parents religious liberty interests."[33] The Fourth Circuit overturned the lower court decision. Viewing *Yoder* narrowly, the Fourth Circuit concluded that *Yoder* did not involve a balancing of state interests in compulsory school attendance against parental religious rights.[34] "Instead, the Fourth Circuit viewed *Yoder* as a fact-specific holding applicable to other types of religious exemption claims."[35]

A North Carolina state court decision provides another example of the *Yoder*-narrowness used to deny parental rights based on religious belief:

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29. *Id.* at 235-6.

30. Tobak & Zirkel, *supra* note 3, at 18; *accord,* Devins, *A Constitutional Right to Home Instruction?,* 62 WASH. U.L.Q. 435, 449-50 (1984).

31. Note, *Home Instruction: An Alternative to Institutional Education, supra* note 1, at 358.

32. 712 F.2d 96 (4th Cir. 1983), *cert. denied,* 465 U.S. 1006 (1984).

33. No. 81-13-Civ.-2 (E.D.N.C. Aug. 20, 1982) at 7, *quoted in* Devins, *supra* note 30, at 458.

34. 712 F.2d at 98.

35. Devins, *supra* note 30, at 459.

> In *Delconte v. State,* parents who had become associated with a fundamentalist Christian group argued that they believed the Bible commands parents to teach and train their children at home. The North Carolina Appeals Court, however, refused to recognize this assertion as a free exercise claim but only as a philosophical or "sociopsychological" choice that did not merit first amendment protection.[36]

The Supreme Court's comments in *Yoder* on any similar secular-based right were even more limiting:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his times and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the religion clauses.[37]

This conclusion is borne out by an examination of some of the most restrictive case holdings involving parents asserting a secular based parental right.

In *Scoma v. Board of Education*[38], a Federal District Court in Illinois heard a substantive due process and equal protection claim by parents who were educating their children at home. In this case, Julie and Richard Scoma withdrew their two children from a Chicago elementary school. Prior to their withdrawal, the Scomas contacted the school administrators for approval of their plan of home education. The school district neither approved or disapproved the plan; however, a month after the Scomas commenced home education, the truant officer allegedly "threatened to officially seize [the] children from their home" if the children did not return to public school within three days.[39]

The Scomas filed for an injunction in Federal District Court seeking to prevent the school authorities from enforcing Illinois compulsory school attendance law. The Scomas asserted the following "fundamental" rights:

> [The] right and duty to educate their children 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 children's freedom of thought and inquiry.[40]

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36. Comment, *The Interest of the Child in the Home Education Question: Yoder v. Wisconsin Re-examined,* 18 IND. L. REV. 711, 720 (1985) (citations omitted); *see generally,* Delaconte v. State, 308, S.E.2d 898 (1983), *rev'd on other grounds,* 329 S.E.2d 636 (1985).

37. 406 U.S. at 216.

38. 391 F.Supp. 452 (N.D. Ill. 1974).

39. *Id.* at 456.

40. *Id.* at 460.

The district court, after distinguishing *Yoder,* went on to hold:

> The plaintiffs' asserted right to educate their children "as they see fit" and "in accordance with their determination of what best serves the family's interest or welfare" does not rise above a personal or philosophical choice and cannot be a claim to be within the bounds of Constitutional protection.[41]

While *Yoder* only stated that philosophical and personal beliefs do "not rise to the demands of the *Religion* Clauses,"[42] the district court, in *Scoma,* held that the parents' personal beliefs regarding their children's education were not entitled to *any* constitutional protections.

In another case, *Hanson v. Cushman*[43], the school district first refused to allow the Hansons to purchase school district textbooks and then filed child neglect charges against the parents in juvenile court. The Hansons sought a declaratory judgment to protect their "fundamental" parental rights based on the first nine amendments. The Federal District Court in Michigan dismissed their challenges to the compulsory school attendance law, saying "[p]lainfiffs 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."[44]

In his analysis of the *Hanson* decision, Professor Stocklin-Enright concludes "that an implicit assumption in the court's analysis is that the state is the primary decision-maker in education."[45]

Other parental rights challenges on constitutional grounds have taken a variety of forms including vagueness, equal protection and due process as well as the *Yoder* religious free exercise approach. Vagueness challenges are rarely successful. In *State v. Moorhead*[46], the Iowa Supreme Court rejected the parents' argument that the equivalent instruction by a certified teacher requirement was unconstitutionally vague on its face.[47]

An equal protection challenge seems foreclosed by *Rodriguez v. San Antonio School District*[48]. In *State v. Edgington*[49], a New Mexico appellate court considered an equal protection challenge to the compulsory

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41. *Id.* at 461.
42. 406 U.S. at 216 (emphasis added).
43. 490 F. Supp. 109 (W.D. Mich. 1980).
44. *Id.* at 112.
45. *Supra* note 5, at 286.
46. 308 N.W.2d 60 (Iowa 1981).
47. *Id.* at 63-4; *cf.,* Burrow v. State, 669 S.W.2d 441, 443 (Ark. 1984) and State v. Schmidt, 505 N.E.2d 627, 627 (Ohio 1987).
48. 411 U.S. 1 (1973).
49. 663 P.2d 374 (N.M. App.), *cert. denied,* 662 P.2d 645 (N.M.), *cert. denied sub. nom.* Edgington v. New Mexico, 464 U.S. 940 (1983).

attendance law. Relying on *Rodriguez,* the appellate court held that the child had no fundamental right to education and in applying a rational basis test concluded that the statute was rationally related to state interests in compulsory school attendance.[50] The actual equal protection argument of the *family* is not discussed in the decision as a case comment in the New Mexico Law Review explains:

> The Edgington's had characterized the appeal in terms of their parental rights . . . . The court of appeals, however, reframed the issue, ignoring the parental rights question and focusing instead on the educational rights of the children . . . . The Edgingtons had asserted their parental rights on both due process and equal protection grounds arguing that the right to direct their children's education implicated privacy rights and mandated strict judicial scrutiny of the statutory scheme. The court's decision to ignore the parental rights left unresolved the Edgingtons' asserted parental rights claims.[51]

In sum, the Lochner-era trilogy only address private schools in their holdings and parental rights are only mentioned in dicta. *Yoder* is limited to parents who belong to long-standing religious fringe groups who meet the narrow criteria of the decision. Thus, both sincere religious parents who fail to meet the *Yoder* criteria and parents who hold non-religious-based philosophical and personal beliefs are provided little or no protection against state compulsory school attendance laws that preclude home education as an alternative to public school or private school education.

IV. A Proposal: Home Education as a Fundamental Right of Privacy

This paper proposes a fundamental right of parents to choose home education, limited only by a compelling state interest and the least restrictive means. This proposed right stands on two legs. The first is a reasonable construction of existing case law to support a fundamental right. The second is a reexamination of the state's interest. "Resolution of the threshold constitutional issue of whether parents have a right to educate their children at home arguably is contingent on a determination of the nature of the state's interest in education."[52]

The privacy penumbra is the most logical base on which to build an argument for a fundamental right of parental choice of home education. First, there is a basis for the right in both the language of the Lochner-era education cases and in *Yoder,* albeit in dicta.[53] Second, educational

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50. 663 P.2d at 377-8.

51. Case Comment, *Constitutional Law — Compulsory Attendance Laws: Who Directs the Education of a Child? State v. Edgington, supra* note 3, at 457-8.

52. Devins, *supra* note 30, at 467.

53. *Id.* at 454; *accord,* Note, *Home Education in America: Parental Rights Reasserted, supra* note 3, at 198.

choices are closely aligned with the child-rearing related privacy recognized as a fundamental right in the *Griswold* line of cases. In *Runyon v. McCrary*[54], the Court commented: "The *Meyer-Pierce-Yoder* 'parental right' and the privacy right, while dealt with separately in this opinion, may be no more than verbal variations of a single constitutional right."[55]

Third, where the state truly has a compelling interest to assert in the education of children, a recognized fundamental right of parents causes the analysis to shift to a due process determination of whether the state has undertaken the least restrictive means to achieve its interest. When the parents' right is not deemed fundamental, as under the current state of case law, it is a right only in name with little or no protection. Without fundamental right status and protection, the parents' interest may be outweighed by any interest of the state, and the state may employ any means it wants including an express or de facto prohibition of the home education choice of parents.

Fourth, a majority of legal commentators advocate establishing a parental right to educate children at home.[56] The supporters of home education are as diverse as the American Civil Liberties Union and the Moral Majority.[57]

A. A REASONABLE CONSTRUCTION OF CASE LAW

The strongest support in the *Meyer* line of cases for the recognition of a fundamental right of privacy is found in *Pierce v. Society of Sisters*[58]:

> Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the [Oregon law in question] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and educating of children under their control . . . The child is not the mere creature of the state; those who nurture him and

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54. 427 U.S. 160 (1976).

55. *Id.* at 178 n. 15; *accord, Roe v. Wade,* 410 U.S. 113, 167-8, (1973) (Stewart, J., concurring); *see also,* Stocklin-Enright, *supra* note 3, at 567-8.

56. *E.g.,* Stocklin-Enright, *supra* note 3, at 563; Note, *Home Education in America: Parental Rights Reasserted, supra* Note 3, at 191; Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis,* 30 B.C.L. REV. 861, 865 (1989); Note, *Parental Liberties Versus the State's Interest in Education, supra* note 4, at 1263; *contra,* Note, *Alternatives to Public School: Florida's Compulsory Education Dilema,* 6 NOVA L. J. 269, 274 (1982) and Lupu, *supra* note 3, at 988.

57. Kansas Legislative Research Development, Proposed Home Instruction Amendment (February 21, 1984) (quoting ACLU Policy) and Divosky, *The New Pioneers of the Home Schooling Movement,* PHI DELTA KAPPAN, February 1983, at 295, Noted in, *Parental Liberties Versus The State's Interest in Education: The Case For Allowing Home Education, supra* note 4, at 1262 and Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway?,* 24 WASHBURN L. J. 274, 275 (1985).

58. 268 U.S. 510 (1925).

> direct his destiny *have the right,* coupled with the high duty, to recognize and prepare him for additional obligations.[59]

This dicta is important despite other language in the case reaffirming the interest of the state to reasonably regulate private schools because it implies that a parental right can overcome the state interest.

In *Farrington*[60], the Court commented that the government regulation not only interfered with the private schools, but also "would deprive parents of fair opportunity to procure for their children instruction which they think important. . . ."[61]

The *Yoder* case contains helpful language in construing a fundamental right to home educate. According to Professor Stocklin-Enright: "Despite its religious context and the effort of the Chief Justice to limit the case to the specific situation of the Amish, *Yoder* is pregnant with possibilities for constitutional protection of parental autonomy."[62]

Chief Justice Burger implies a *primary and fundamental right* of parental choice of a child's education that is rooted in history:

> [T]his case involves the *fundamental interest of parents,* as contrasted with that of the State, to guide the religious future and *education of their children.* The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This *primary role of the parents* in the upbringing of their children is now established beyond debate as an enduring American tradition."[63]

Chief Justice Burger, who wrote the majority opinion in *Yoder,* wrote in a later concurring opinion to a per curiam decision that "[f]ew familial decisions are as immune from governmental interference as parents' choice of a school for their children . . ."[64]

Finally, the privacy cases in the line of *Griswold v. Connecticut*[65] lend support to a fundamental right of parental home education choice under the privacy penumbra. *Griswold* noted that based on the *Pierce* decision, "the right to educate one's child as one chooses is made applicable to the States. . . ."[66]

The Supreme Court in *Roe v. Wade*[67] reasoned that "decisions make it clear that only personal rights that can be deemed 'fundamental' . . . are

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59. *Id.* at 534-5 (citations omitted, emphasis added); *see also,* Ginsburg v. New York, 390 U.S. 629, 639 (1968).

60. 273 U.S. 284 (1927).

61. *Id.* at 298.

62. *Supra* note 3, at 570; *see also* Stocklin-Enright, *supra* note 5, at 293.

63. *Yoder,* 406 U.S. at 232 (emphasis added).

64. Cook v. Hudson, 429 U.S. 165, 166 (1976) (Burger, C.J., concurring).

65. 381 U.S. 479 (1965).

66. *Id.* at 482.

67. 410 U.S. 113 (1973).

included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . child rearing and *education* . . . ."[68] Justice Douglas, concurring in *Doe v. Bolton,*[69] set forth a list of fundamental rights under the heading of "freedom of choice in the basic decisions of one's life." The list included "education and upbringing of children."[70] Furthermore, in *Paul v. Davis*[71], the Court announced that the right to privacy includes "matters relating to marriage, procreation, conception, *family relationships and child rearing and education.*"[72]

The circle is made complete in *Carey v. Population Services International*[73] when the Court cites the *Meyer & Pierce* education cases as privacy right cases.[74]

B. A REASSESSMENT OF STATE INTERESTS

Yoder provides a useful point of departure for a reassessment of state interests. The majority found two state interests in the education of children. The first interest is the necessity of the state "to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[75] The second interest is in preparing children "to be self-reliant and self-sufficient participants."[76]

Only the first interest holds up to closer inspection as a primary interest of the state itself. This first interest can be called the "operation of the franchise"[77] or "collectivist interest."[78] Stocklin-Enright reasons that "[t]he sole interest which *emanates from the nature of the state* is the first [interest]: The state in the particular form in which it exists in the United States, requires for its continued existence at least the nominal participation of citizens in its processes by voting."[79]

Another has argued that "[h]istorically, the compelling state interest in

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68. *Id.* at 152-3 (emphasis added).

69. 410 U.S. 179 (1973).

70. *Id.* at 211 (Douglas, J., concurring).

71. 424 U.S. 693 (1976).

72. *Id.* at 713 (emphasis added).

73. 431 U.S. 678 (1977).

74. *Id.* at 684-5; *see also,* Note, *State Regulation of Private Education: Ohio Law in the Shadow of United States Supreme Court Decisions, supra* note 67, at 1010-11.

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

76. *Id.*

77. Stocklin-Enright, *supra* note 3, at 581.

78. Comment, *The Interest of the Child in the Home Education Question: Yoder v. Wisconsin Re-examined, supra* note 36, at 717.

79. Stocklin-Enright, *supra* note 3, at 578 (emphasis added); *see also,* Stocklin-Enright, *supra* note 5, at 288-9.

education has not been so much the welfare of the individual child as the welfare of the collective state."[80] It is only the state's interest in the operation of the franchise that is a compelling interest because it is the only interest that is an interest of the state alone.

The second interest mentioned in the *Yoder* majority was described to be the interest of the state in preparing children "to be self-reliant and self-sufficient participants in society."[81] "Such an assertion of interest is not justifiable from any inherent characteristic of the state qua state. . . ."[82] This self-reliance and self-sufficiency is really an interest of the child and the parent because it is the child's welfare that is primary, not the state's welfare. Stated another way, any interest of the state in the child's self-reliance or self-sufficiency is on behalf of the child's welfare not on behalf of the welfare of the state. The Supreme Court in *Prince v. Massachusetts* defined the "public interest" as "the general interest in youth's well-being"[83]:

> [N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.[84]

The Court also commented on the role of the parent vis-a-vis the state, saying the "custody, care and nurture of the child *first* resides in the parents."[85]

Arguably then, the state's interest is only secondary; it is not a compelling interest. It only becomes a primary and compelling interest only if the parent fails to protect the child's welfare:

> While the state often intervenes on behalf of citizens too weak or otherwise unable to protect their own interests, if [sic] does so usually *in the absence of all other safeguards.* In the present context [home education], the parent provides the first line of safeguards for the child. The courts have continually stated that the parent is presumed to act in the best interests of the child. If the parent fails in this respect then the state can intercede since the presumption of acting in the child's best interest is rebutted. At most, the state has an interest in ensuring that the parent is acting in the child's best interest.[86]

Thus, as discussed in the next section, the state's regulation of the home education choice must be narrowly tailored to testing of the child's educational progress.

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80. Note, *Home Education in America: Parental Rights Reasserted, supra* note 3, at 204.
81. *Yoder,* 406 U.S. at 221.
82. Stocklin-Enright, *supra* note 3, at 580.
83. 321 U.S. 158, 166 (1944).
84. *Id.*
85. *Id.* (emphasis added).
86. Stocklin-Enright, *supra* note 3, at 578 (emphasis in the original).

Chief Justice Burger in a later case reaffirmed this presumption that parents act in the best interest of their child:

> The law's concept of the family rests upon the presumption that the parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interest of their children.[87]

This judicial deference to the primacy of the parent is a product of the presumption of care exercised by parents generally as opposed to the state:

> [P]arents typically possess a sensitivity to the child's personality and needs that the state cannot match, and because the closeness of the familial relationship provides strong assurance that parents will use their special knowledge of the child to act in his best interests. Finally, the parental right of control serves the interests of all citizens in preserving a society in which the state cannot dictate that children be reared in a particular way. If the state could control the upbringing of children, it could impose an orthodoxy by indoctrinating individuals during the formative period of their lives.[88]

A third possible state interest, suggested by Justice White in his concurring opinion, is to assist children in preparation "for the life style that they may later choose, or at least to provide them with an option other than the life they led in the past."[89] However, on closer analysis this life-style-preparation is the kind of interference with parental choice of cultural education that the Court condemned in *Meyer* and *Farrington*. In both cases the government sought to prevent exposure of ethnic children to values and beliefs outside their ethnic family background through regulation of either their private teachers as in *Meyer* or their private schools as in *Farrington*. When children are compelled to attend schools devoid of sensitivity for deeply rooted familial values, the state's interests in "lifestyle preparation" may be seen for what it is — a direct assault on the transmittal of unapproved teachings by the family.

Justice Powell writing for the plurality in *Moore v. City of East Cleveland*[90] stated:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.[91]

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87. Parham v. J.R., 442 U.S. 584, 602 (1979).

88. Note, *Developments In The Law — The Constitution and the Family,* 93 HARV. L. REV. 1156, 1353-4 (1980).

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

90. 431 U.S. 494 (1977).

91. *Id.* at 503-4; Justice Brennan, concurring in the same opinion, stated: "*If any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly*

As Professor Stocklin-Enright points out, the life-style preparation interest is really an interest of the child and not a state interest. The child is the person "directly and predominantly affected" by this potential future life-style choice.[92] Although Justice White seems to be arguing that the state can provide an expanded cultural exposure, Stocklin-Enright points out that "[i]f the job were granted to the state, the inevitable tendency would be to reduce the number of cultural options, creating a strong drive toward conformity. Such is the nature of the majoritarian state."[93]

This interest does not seem to be the type of interest that the state can legitimately step into in its parens patriae role. Only cultural choices that represent a threat to the child's health or welfare activate the state's parens patriae power. For example, diet may be an area where culture and health/welfare overlap and state intervention may be justified. However, the question before the Court in *Yoder* was *education.*

Neil Devins, then Staff Attorney for the United States Commission on Civil Rights argues that the socialization interest of the state has been recently "discredited" by the Supreme Court in *Board of Education Island Trees Union School Free District v. Pico*[94]. Mr. Devins explains:

"*Pico* prohibited school boards from removing library books for ideological reasons. By holding that the first amendment protects a student's right to receive political information, the Court suggested that social homogenization is not a proper goal of education."[95]

In view of the above, the life-style preparation interest proposed by Justice White is not a legitimate interest of the state and at best should be considered a minority view limited to mature minors. "[S]ocialization is *not* an educational factor, but rather a social factor that is not even a legitimate state concern (much less a compelling state interest)."[96]

To summarize, what is proposed is a fundamental privacy right of parents to choose home education for their children. This right finds support in a reasonable construction of Supreme Court pronouncements in the *Meyer*-line of education cases (substantive due process), in *Yoder* (historical and traditional rights of parents), and the *Griswold*-line of privacy cases (privacy of family-related decisions).

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the family". Id. at 511 (Brennan, J., concurring) (emphasis in the original); *see also, Board of Education v. Barnette,* 319 U.S. 624 (1942), where the Court stated: "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officers shall compel youth to unite in embracing." *Id.* at 614.

92. Stocklin-Enright, *supra* note 3, 579.

93. *Id.*

94. 457 U.S. 853 (1982).

95. Devins, *supra* note 30, at 470, n. 208.

96. WHITEHEAD & BIRD, *supra* note 4, at 88 (emphasis in the original).

Reassessing the state interests reveals that the state may *not* interfere with the traditional and fundamental right of parents to pass on values, beliefs, language, culture, and family identity to their children based on an interest in socialization, Americanization, or cultural enhancement. Reassessment shows that the state does not have a primary interest in developing self-reliance and self-sufficiency in children. This is the interest of the child and only when the parent fails may the state step in to protect the welfare interests of the child. Until then, the state interest is not of a compelling nature. Only the interest of the state in the operation of the franchise is inherent in the nature of the state and thus able to rise to a compelling level.

V. An Application of the Proposal

The fundamental right of privacy residing in the parent protects the parent from government interference in the home education choice on the basis of merely legitimate interests or in announced interests that have no relation either to the state qua state or to the active parens patriae role of the state when necessary to protect the child's health and welfare. A close inspection of asserted state interests exposes less than compelling interests or alleged interests that are violative of the constitutional concept of liberty.

The affirmation of a compelling state interest in the preparation of citizens to operate the franchise and to protect the welfare interests of children ensures that the state can continue to protect those interests by reasonably regulating education as determined in *Pierce.*

When a fundamental right clashes with a compelling state interest, due process dictates that the state must show that it has chosen the least restrictive means to achieve its interest. Thus, the state may only use the least restrictive means to regulate home education.

One interesting comment[97] pointed out that the "Famous Footnote Four" of the *Carolene Products* case cited the *Meyer-Pierce-Farrington* trilogy as embodying the "then-existing Supreme Court pronouncements on state control of education as examples of the principle that greater judicial scrutiny is required where legislation appears to be a product of prejudice against discrete and insular minorities."[98] The author of the comment framed the issue as follows:

> The regulation of private education acutely poses the problem of tension between majoritarian governance and the protection of minorities. Regulation of private

97. Note, *State Regulation of Private Education: Ohio Law in the Shadow of United States Supreme Court Decisions,* 54 U. CIN. L. REV. 1003 (1986).

98. *Id.* at 1004.

> education can impinge upon parents' ability to direct the upbringing of their children. Such regulations may make it impossible for a parent or group to pass on a way of life to their offspring.[99]

Application of the "greater judicial scrutiny" is thus required when the state impinges on parental choices of education. Such application would require states "to couch their regulation of private education in terms of quantifiable academic goals."[100]

A. AN OVERVIEW OF STATE-IMPOSED RESTRICTIONS

State statutes and cases that regulate or affect home education can be classified under several headings. The first are those statutes and/or cases that flatly prohibit home education. Obviously this is the most restrictive means and it is evident that this kind of regulation is not necessary to protect the states's compelling interests. Yet, under the current case law conditions, an absolute prohibition may be imposed. For example, although North Carolina's compulsory school attendance statute contains no express provision regarding home education[101], the 1983 cases of *Delconte v. State*[102] and *Duro v. District Attorney*[103] clearly created a prohibition on home education. Devins, citing the State's brief in *Duro,* explains:

> North Carolina prohibits home instruction because the state claims that it cannot rely on the parents to provide the necessary motivation to the child to assure that the child has access to a quality education. Unlike operators of nonpublic schools, the State believes that it cannot rely on the existence of collective market forces in the form of parental demands and concerns to assure that children have access to education and that the education provided will be of some minimal quality. North Carolina's absolutist approach is unusual, however.[104]

Another form of regulation is statutes that require teacher certification.[105] This is also too restrictive for two reasons. First, it eliminates almost all parents and thus creates a nearly absolute prohibition.[106] Second, there is no evidence that lack of a teacher certification

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99. *Id.* at 1003.

100. *Id.* at 1004.

101. N.C. GEN. STAT. § 115C-378 (1983); *see also,* Note, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators, supra* note 3, at 472, n. 26.

102. 308 S.E.2d 898 (N.C. App. 1983), *rev'd on other grounds,* 329 S.E.2d 636 (1985).

103. 712 F.2d 96 (4th Cir. 1983).

104. Devins, *supra* note 30, at 441.

105. *E.g.,* IOWA CODE ANN. § 299.1 (West Supp. 1984); MICH. COMP. LAWS ANN. § 388, 555 (1979); N.D. CENT. CODE § 15-34.1-01 (1981).

106. Devins, *supra* note 30, at 473; *accord,* WHITEHEAD & BIRD, *supra* note 5, at 85 and Stocklin-Enright, *supra* note 5, at 294-5: "It is doubtful that the teacher certification requirement would withstand a rigorous "reasonableness" analysis, since the requirement is too broad to satisfy the state's actual interest in the issue."

will result in impairment of the state's compelling interest: "For her [the parent] to accept certification would not make her a better teacher, nor would it make her children learn easier, nor would it provide any additional benefits for her, her children, or the State."[107]

Another category of regulation requires that a parent duplicate the public school system generally or in some specific area. Some state laws require an "equivalent" program be provided in the home.[108] (It is the "equivalency" laws that often are attacked under a vagueness argument). "If the provision requires literal equivalence to public schools, then it is no real alternative and unless a wider choice is allowed under the 'private school' option, it is unconstitutionally restrictive."[109]

Some school authorities interpret the "equivalency" to require home educators to use the same curriculum that is used in the public school.[110] But for some home educators, criticism and dissatisfaction with the public school curriculum is often the motivation to home educate their children. This decision would effectively be vetoed if the parent has to use the public school approved texts and materials.[111] The public schools themselves do not use the same curriculum in every school district in the country. The Supreme Court in *Farrington* directly addressed the regulation of teachers and curriculum in the private setting when it held:

> [T]he 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 detail . . . and deny . . . reasonable choice and discretion in respect of teachers, curriculum and textbooks. Enforcement of the Act probably would destroy most, if not all of [the private schools in question]; and would certainly

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107. State v. Nobel, No. 5791-0114-A (Mich. Dist. Ct. Allegan County, June 9, 1980, *cited with approval* in WHITEHEAD & BIRD, *supra* note 4, at 68.

108. *E.g.*, ME. REV. STAT. ANN., title 20-A, § 5001-A (1983).

109. Stocklin-Enright, *supra* note 3, at 610.

110. *E.g.*, KY. REV. STAT. ANN. §§ 159.080, 156.445(2), 156-160(7) (Bobbs Merrill Supp. 1982). The Kentucky Supreme Court in Kentucky State Board for Elementary & Secondary Education v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979) held the interpretation that private schools must use the same texts as public schools as violative of Section 5 of the Kentucky Constitution. This unique section of the Kentucky Constitution provided: "[N]or shall any man be compelled to send his child to any school to which he may conscientiously object".

111. The Kentucky Supreme Court in holding the "same curriculum" interpretation of the compulsory attendance law as unconstitutional remarked:

> The textual materials used in the public schools are at the very heart of the conscientious opposition to those schools. To say that one may not be compelled to send a child to a public school but that the state may determine the basic texts to be used in the private or parochial schools is but to require the same hay to be fed in the field as fed in the barn.

Rudasill, 589 S.W.2d at 884.

> deprive parents of fair opportunity to procure for their children instruction which they think important and we can not say is harmful.[112]

Requiring home educators to teach exactly the same number of days and hours taught in public school[113] is also too restrictive of the liberty the parent is seeking to exercise. Parents choosing home education may be seeking to avoid the regimentation of the public school or to design a personalized instructional program in which a public school schedule would not fit.[114] It is axiomatic that a parent teaching one or two children at home should not require the same amount of time to teach as a public school teacher instructing 35 children. Much of the public school teacher's time is spent in maintaining classroom control and discipline or attending to administrative tasks rather than pure instruction. As noted by one commentator:

> The state may be able to require that its populace grow up literate, but it should not be able to mandate a day-by-day, hour-by-hour directive of what a child's education should consist of and where his education should take place. Institutionalized schooling is not the least restrictive means, and it may not even bear a reasonable relation to the state's objective.[115]

Equivalency that requires a parent to teach *all* of the subjects taught in the public school[116] is too restrictive and not necessary to achieve the compelling interests of the State. Music appreciation or poetry composition, as extreme examples, are not vital to preparing children to be good citizens nor is the child's welfare endangered if he or she does not receive instruction in those areas. Conversely, to use another extreme example, requiring religiously-motivated parents to teach evolution at home may unnecessarily interfere with the parents' private choice to educate the child in the creation story.

B. STANDARDIZED TESTING: THE LEAST RESTRICTIVE MEANS

The State's regulation meets the least restrictive means test, however, when it "require[s] no more than those subjects essential to the adequate operation of the franchise."[117] This article suggests that enforcement and monitoring can be accomplished through annual standardized testing. "Competency examinations provide the best vehicle to balance the state's

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112. 273 U.S. at 298.
113. *E.g.*, VA. CODE ANN. § 22.1-254 (Supp. 1984).
114. Note, *Missouri Home Education Free At Last?, supra* note 3, at 357.
115. Note, *Home Education in America: Parental Rights Reasserted, supra* note 3, at 204-5.
116. *E.g.*, IDAHO CODE § 33-202 (1982); MICH. COMP. LAW ANN. § 380.1561 (1979).
117. Stocklin-Enright, *supra* note 3, at 581.

interest in an educated populace against a parent's interest in directing the upbringing of his children."[118]

Some parents may object to standardized testing as another form of state intrusion, but it would seem to be the least intrusive means of regulation.[119] Another objection may be that testing fosters the kind of competitive atmosphere the parent was seeking to avoid through home education.[120] However, testing conducted once a year would have minimal impact on the atmosphere of the home education program. Besides serving the State's interest, standardized testing can serve the interest of the parent and child by validating the credibility of home education within the general community.[121] Test result data in Alaska, Arizona, Arkansas, North Carolina, Oregon, Tennessee and Washington show home educated children to "perform at or above the average levels on nationally recognized standardized achievement tests."[122]

A note in the Baylor Law Review cited the following Model Home Education Statute produced by the Rutherford Institute, a non-profit legal and educational organization:

> (1) Instruction must be offered in the home by a tutor having at least a baccalaureate degree or by a parent . . . (2) the parent must notify the local superintendent of his or her intent to commence or terminate home instruction . . . (3) the parent must keep attendance records and submit them on a monthly basis . . . (4) the parent must submit to the local superintendent at the end of the year of home instruction either (a) evidence that the child has obtained a composite score of 40% or better on a nationally recognized achievement test in the subjects of English grammar, reading, social studies, science and mathematics or (b) an evaluation or assessment which, in the judgment of the local superintendent, indicates the child is making an adequate level of educational growth . . .[123]

Both Devins and law and education researcher Patricia M. Lines suggest that the strongest opposition to testing may come from the states.[124] Some older cases have ruled against home educators under the rationale that supervision of home education is unreasonably burdensome.[125] This

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118. Devins, *supra* note 30, at 473.

119. *Contra,* WHITEHEAD & BIRD, *supra* note 4, at 94: "We do not encourage the imposition of a testing requirement, because home education itself constitutes the least restrictive means."

120. Note, *Home Instruction: An Alternative to Institutional Education, supra* note 1, at 377.

121. *Id.*

122. Smith & Klicka, *supra* note 4, at 303; *see also,* FARRIS, HOME SCHOOLING AND THE LAW, 41 (1990).

123. Note, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators, supra* note 3, at 484-5.

124. Devins, *supra* note 30, at 473; Lines, *supra* note 8, at 219.

125. People v. Turner, 263 P.2d 685, 687 (Cal. 1953); State v. Hoyt, 146 A. 170, 171 (N.H. 1929).

reasoning can pass muster under rational basis scrutiny, but cannot survive the strict scrutiny which would be applied if the parental right of home education was held to be fundamental in character. This argument of unreasonable burden also fails on its merits since "[h]ome instructed children can be tested for progress at the same time their peers in the public schools are tested."[126]

Devins argues that state objections to testing as "after-the-fact regulations" that are inferior to affirmative education standards "are unconvincing as a policy matter."[127] He concludes:

> Underlying (and ultimately fatal to) [the state's] argument is a presumption that a substantial enough number of home study students will fail to justify state-imposed burdens on pluralism, religious liberty, and parental rights. The evidence, however, is to the contrary. If anything, it appears that parents who teach their children at home are doing a better job than the public schools.[128]

For the small number of home educated children who test below standards, state intervention as parens patriae is allowable. Even then the least restrictive means may be state assistance to the home educating parent.[129] If that alternative is not successful, then the parent may be required to enroll the child in a private or public school.[130]

Lines acknowledges that teachers unions are the source of heavy opposition to home education. Comparing teacher certification requirements (favored by teachers unions) and standardized tests, she points out that teacher certification is based on competency tests. The question she poses is whether testing parents or testing the children is more in line with the expressed interests of the state.[131]

Teacher certification, time requirements, curriculum requirements and the like are means-oriented, whereas, standardized testing is ends-oriented. Where the states interests in an educated populace is met and validated through ends-oriented testing, the means-oriented requirements are overly intrusive and unnecessary.

C. A HYPOTHETICAL APPLICATION

A 1983 Kansas Supreme Court case provides a useful fact pattern for a hypothetical application of the proposal of this paper. In *In the Interest of*

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126. Note, *Home Instruction: An Alternative to Institutional Education, supra* note 1, at 376.

127. Devins, *supra* note 30, at 473.

128. *Id.* at 473-4.

129. Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway?, supra* note 57, at 297-8.

130. Lines, *supra* note 8, at 218.

131. *Id.* at 219.

Sawyer[132], Tom and Bonnie Sawyer appealed a lower court ruling that their children, Matthew, age 8, and Anna, age 11, were "children in need of care" because their mother was teaching them at home.[133]

According to the the facts in the opinion, the Sawyers became dissatisfied with the public school due to poor performance by Matthew in the prior school year. The Sawyers set up their own home education program and registered it as a private school with Kansas Board of Education with Anna and Matthew as the only students.[134] The court found that:

> The courses taught include reading, writing, arithmetic, geography, spelling, English grammar and composition, history of the United States and of the State of Kansas, civil government and the duties of citizenship, health and hygiene, and partriotism and the duties of a citizen suitable to the elementary grades.
> Mrs. Sawyer does not have a college degree nor a teaching certificate; nor does she have teaching experience. She has one and one-half years of college education. She graduated from high school with a 3.5 grade point average on a 4.0 scale.[135]

The court also noted that the children were not tested.[136]

Certainly the program that was conducted was comprehensive on its face and arguably directed toward achieving goals within the state's interest in maintaining the franchise. These facts do not indicate any threat to the children's health and welfare that would activate a compelling parens patriae role of the state. In fact, health education was included in Bonnie Sawyer's curriculum. Both the state and the Sawyers employed psychologists to evaluate the children. Neither reported health or welfare risks caused by home education. The only question raised by the state's expert was whether Matthew was deprived of socialization.[137] However, as we have discussed, socialization is at best a questionable legitimate interest of the state, not a compelling one.[138]

Therefore, the only compelling interest the state had in this case was the determination that the children were making progress toward the goal of adequate citizenship. Against this compelling interest is the fundamental right of the parents to choose home education for their children.

The least restrictive means to ensure the furtherance of the state's interest should have been testing of the children to determine whether the children were meeting minimal requirements of education necessary to

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132. 672 P.2d 1093 (Kan. 1983).
133. *Id.* at 1094.
134. *Id.*
135. *Id.*
136. *Id.* at 1097.
137. *Id.* at 1096.
138. *Supra* note 101.

prepare them for citizenship. Instead, the Kansas Supreme Court deferentially affirmed the lower court and labeled the Sawyer's home education program a "thinly veiled subterfuge attacking compulsory school attendance."[139] The court questioned the family's motivation and concluded: "The only goal of the arrangement is to extricate Matthew from his failure in public school."[140] This begs more than one question. Shouldn't parents have the right to choose an alternative education for their child who is failing in his present situation? Who bears the responsibility for Matthew's failure? What compelling interest of the state is served by intruding into the private reasons of the Sawyers for choosing home education? Recall Justice McReynolds' admonition in *Pierce:*

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[141]

VI. Conclusion

At common law, a parent had a duty to provide for the education of the children.[142] Despite the later development of the public schools, this traditional duty was reaffirmed by the Supreme Court in *Pierce* as "the high duty, to recognize and prepare [the child] for additional obligations."[143] At the same time, the Court has at various times announced that the parents have a right as well as a duty to provide for the education of children.[144] Concerning that duty, "[p]arents who would direct the education of their children have three basic alternatives: to select a private institution or tutorial program which conforms to their educational philosphy, to attempt to influence the public school system, or to provide instruction for the child at home."[145]

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139. *Id.* at 1097.

140. *Id.; contra* People v. Levison, 90 N.E.2d 213, 215 (1950), where the Illinois Supreme Court stated: "[T]he object [of compulsory education laws] is that all children shall be educated, not that they shall be educated in any particular manner or place."

141. *Pierce,* 268 U.S. at 535.

142. 1 BLACKSTONE, COMMENTARIES, 450-53 (1st Ed. 1809); *see also,* Gordon v. Board of Educ. of City of Los Angeles, 178 P.2d 464, 481 (concurring opinion) (Cal. 1947) and School Bd. Dist. No. 18 v. Thompson, 103 P. 578, 579 (Cal. 1909).

143. 268 U.S. at 535.

144. Cook v. Hudson, 429 U.S. 165, 166 (1976) (Burger, C.J., concurring); Paul v. Davis, 424 U.S. 693, 713 (1976); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Farrington v. Tokushige, 273 U.S. 284, 298 (1927); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

145. Note, *The Right to Education: A Constitutional Analysis,* 44 U. CIN. L. REV. 796, 796 (1975), *quoted in* Note, *Home Instruction: An Alternative to Institutional Education, supra* note 1, at 355.

Without a fundamental right balanced against actual state interests either emanating from the nature of the state or an activated parens patriae interest, the state, through its statutes and judicial decisions, can absolutely preclude exercise of the third choice.[146] It should be no comfort that most states do not preclude home education because tomorrow each state could enact a law totally prohibiting home education.

Without a fundamental right grounded in privacy and due process, only an Amish-like parent who can meet the rigid standards of *Yoder* can obtain protection, and even then, *Yoder* is limited to mature minors. Other religiously-motivated parents and all other parents choosing home education for secular reasons stand unprotected.

Without a fundamental right to shield the family, the state can concoct any interest to justify criminal prosecution, fines, jail, and removing the children from the custody of their parents. Over one million families now stand without protection from arbitrary invasion of an intimately private choice.

A fundamental right of privacy protects the autonomy of all families regardless of whether religious or non-religious beliefs form the basis of their choice of home education. A fundamental right protects the historical and traditional choices of parents. The state interest in its continued vitality and existence as a democratic system should also be protected. The child's over-all interests are protected by giving primary decision-making power to the parent, while the state stands as secondary guarantor of the protection of the child's health and physical welfare interests.

The case law supports a reasonable construction of a fundamental right, rooted in the privacy penumbra, of parents to choose home education for their children. The state should not be permitted to interfere with this parental right unless it asserts a compelling interest in preparing children to exercise the franchise and it has chosen the least restrictive means to protect that interest. The key analysis is the nature of the State regulation and how narrowly tailored the regulation is in relation to those rights.

> Families should be encouraged to take a larger — not smaller — role in the education of the young. Parents willing to teach their children at home should not be regarded as freaks or lawbreakers. And parents should have more, not less, influence on the schools.[147]

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146. Stocklin-Enright, *supra* note 5, at 294: "Absent a claim of a fundamental right or a specifically enumerated constitutional right, no serious argument can be made against the proposition that the state has a reasonable right to regulate the education decision."

147. A. TOFFLER, THE THIRD WAVE 370 (1990).