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PARENTAL RIGHTS: EDUCATIONAL ALTERNATIVES AND CURRICULUM CONTROL

The vital function of education in a democratic society makes the choice of a child's educational alternatives a crucial decision.¹ Education has become predominantly a state function because the learning experience in school is a paramount concern of modern society.² This state interest, and the resultant state power to compel education,³ often conflicts with the parents' right to choose the schooling for their children. Rather than ruling that one interest is paramount, the United States Supreme Court has chosen to balance these interests.⁴ As a result of this compromise, there are no clear guidelines establishing the degree to which the state may regulate education without infringing upon the rights of the parents.⁵

The constitutional basis of the parental right to choose the schooling for one's child has never been satisfactorily identified.⁶ At common law,

¹ See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). In discussing the importance of education in an advanced society the *Brown* court stated:

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

² See generally J. CONANT, *THE CHILD, THE PARENT AND THE STATE* 15-17 (1960) [hereinafter cited as CONANT]; Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAW. 530, 531-32 (1975) [hereinafter cited as *Freedom and Public Education*]. Demands of World War II for improved education raised public consciousness of the need for youth with more sophisticated training than had been provided previously by public education. Prior to this development judicial skepticism about government interference with rights of citizens had waned and the courts were willing to accept expansion of the required curriculum in public schools. See, e.g., *Alexander v. Phillips*, 31 Ariz. 503, —, 254 P. 1056, 1059 (1927) (ultimate purpose of public schools is matter of reasonable discretion of school authorities). After the decline of the substantive due process doctrine, see notes 35-36 *infra*, the courts ceased to explore whether compulsory courses performed a proper educational function. See Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction*, 50 S. CAL. L. REV. 871, 890-93 (1977) [hereinafter cited as *Public School Curriculum*]; Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 612-13 (1970).

³ See text accompanying notes 14-19 *infra*.

⁴ D. KIRP, M. YUDORF, *EDUCATIONAL POLICY AND THE LAW* 6-8 (1974).

⁵ L. PETERSON, R. ROSSMILLER & M. VOLZ, *THE LAW AND PUBLIC SCHOOL OPERATION* 389 (1969).

⁶ See text accompanying notes 20-28 *infra*.

Although children are "persons" within the meaning of the Bill of Rights, see *Haley v. Ohio*, 332 U.S. 596, 599, 601 (1948), and have been extended the protection of the fourteenth amendment, *In Re Gault*, 387 U.S. 1, 30-31 (1967), they do not enjoy the right to control their own education. Thus, despite the fact that the procedural safeguards of the fifth amendment are applicable to children, *In Re Winship*, 397 U.S. 358, 364-65, 368 (1970) and that students are entitled to the first amendment rights of freedom of speech, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), and free exercise of religion, see *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972), most education cases focus on the rights of the parents. See generally 406 U.S. at 241-46 (Douglas, J., dissenting in part).

the parents' authority over the education of their children was a natural right arising out of the familial prerogatives of custody, care and nurture of offspring.⁷ The parents were entitled to have their children taught where, when, how, what and by whom they judged best able to fulfill the child's interest in a quality education.⁸ The recognition of a fundamental community interest in a child's education later tempered the parental control over the child.⁹ Within the limits imposed by society's need for training "good citizens," parents retained the natural right to control the rearing and education of their children.

As a consequence of the increasing complexity of the process of socialization, the family gradually has been relieved of its educational function.¹⁰ The exercise of contemporary parental right usually is limited to the parents' choice of public or non-public educational institutions or home instruction. This choice is often made between different value systems¹¹ which are established through the curriculum¹² offered by each alternative

The "educational trinity" involves the interests of the state, the parents and the child. However, confrontation in the courts has resulted from the clash between the rights of the parents and the rights of the state. The argument that the child should have a voice has been derived from the court practices in custody and neglect proceedings. Knudson, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506 (1974). See generally Forer, *Rights of Children: A Legal Vacuum*, 55 A.B.A. J. 1151 (1969). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court refused to call into question the traditional concepts of parental control over the children's educational preference despite Justice Douglas' contention that the children's wishes should be considered. 406 U.S. at 231. The courts are not likely to allow the minor the right to make a value judgment which traditionally has been made by the family. See *Doe v. Irwin*, 441 F. Supp. 1247, 1249-50, 1253-55 (W. D. Mich. 1977).

⁷ See 1 W. BLACKSTONE, COMMENTARIES 450-53 (1809). At common law parents had absolute authority over the education of their child. As society developed, parents delegated part of this authority to tutors or schoolmasters who stood in loco parentis to the child. The tutor's authority was commensurate with the parental power committed to his charge. *Id.* at 452. In a society based upon feudal concepts, the child represented "paternal chattel" owing services to his father. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 56 (1970).

⁸ *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, ___, 255 P. 610, 613 (1927).

⁹ The state for its own protection can require children to be educated. Consequently, certain studies plainly essential to "good citizenship" must be taught even if contrary to the wishes of the parents. The parents, however, had the right to refuse to send their children to classes not essential to "good citizenship." *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, ___, 255 P. 610, 613 (1927). In *Stanley*, the Colorado Supreme Court ruled that Bible teaching was not essential to good citizenship, enabling the child to withdraw from required readings of the Bible. *Id.* at ___, 255 P. at 614. The courts warned that state authority must be tempered with due regard for the desires and interests of the parents because the teacher only had a temporary interest in the welfare of the child. *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, ___, 144 N.W. 1039, 1042 (1914) (parental choice not to have child taught domestic science); *accord*, *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, ___, 205 P. 49, 54 (1921) (exemption from dance in physical education class).

¹⁰ O. BANKS, *THE SOCIOLOGY OF EDUCATION* 66 (1968) [hereinafter cited as BANKS]; see J. HOGAN, *THE SCHOOLS, THE COURTS AND THE PUBLIC INTEREST* 1 (1974).

¹¹ See, e.g., *School Dist. of Abington v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) (required reading of the Bible in public schools declared unconstitutional).

¹² As used herein "curriculum" refers to the courses of study, subjects, classes and organized group activities provided by a school. E.g., CAL. EDUC. CODE § 51013 (West 1978).

mode of education. While the academic policies of the public schools usually reflect community consensus, the policies of private educational efforts often reflect the particular ideological or philosophical views of the founders, trustees, administrators, faculties or, in the case of home instruction, the parents.¹³ This choice, however, is not unfettered. The state's interest in education justifies a reasonable assertion of its authority to protect the child's welfare.¹⁴ The state as *parens patriae*¹⁵ acts to guard the "general interest in the youth's well-being," and to secure the needs of society in a responsible citizenry.¹⁶ Although the state's role in the educational process may be viewed by parents as an usurpation of parental dignity and rights,¹⁷ "education is perhaps the most important function of state and local government."¹⁸ Although the family still shares in the socialization process,¹⁹ the legal rights necessary to protect this role have not been sufficient to impede state encroachment.

Although the right of parents to control their children's upbringing is well-established, the Supreme Court has not declared the parents' right to

"Course of study" means the planned content of a series of classes, courses, subjects, studies, or related activities. *E.g.*, CAL. EDUC. CODE § 51014 (West 1978).

¹³ *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1054-55 (1968) [hereinafter cited as *Academic Freedom*].

¹⁴ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The state fulfills its role as guardian of the community by safeguarding the child from parental abuses and by protecting the child's educational opportunities for growth into a "free and independent" citizen. *Id.* at 165. In *Prince*, the defendant claimed that the rightful exercise of her religious convictions, as well as her parental rights, entitled her to direct her child to sell religious magazines in contravention of the Massachusetts child labor laws. The Supreme Court upheld the statute's enforcement. The Court stated that *Meyer v. Nebraska*, 261 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), had recognized a private realm of the family beyond state regulation. 321 U.S. at 166. State authority, however, is not automatically nullified by a parent's claim of religious or parental rights. The state is entitled to act to protect the community interests. *Id.*

¹⁵ The doctrine of *parens patriae* refers to the state's sovereign power of special protection and control over persons without legal capability, such as minor children. *E.g.*, *McIntosh v. Dill*, 86 Okla. 1, —, 205 P. 917, 925 (1922). The state has the constitutional power to protect the child's well-being for state interests and to aid the discharge of parental responsibilities. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹⁶ *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). The state interest in a system of compulsory education traditionally has been advanced in terms suggested by the *Prince* decision. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the state argued that effective and intelligent participation in a democratic political system requires some degree of education for its citizens. Further, education prepares individuals to be self-reliant and economically self-sufficient participants in society. 406 U.S. at 221.

¹⁷ In recent years, the establishment of health and sex education courses in the public schools typifies to some parents the erosion of their role in guiding the upbringing of their children. Since these subjects were once solely within the province of personal family relationships, the intrusion has been acutely felt by some parents. See *Valent v. Board of Educ.*, 114 N. J. Super. 63, 76, 274 A.2d 832, 839 (1971) (validity of sex education program); see, e.g., *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App.3d 1, 124 Cal. Rptr. 68 (1975).

¹⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). See Reutter, *The Law and The Curriculum*, 20 LAW AND CONTEMP. PROB. 91, 91 (1955).

¹⁹ See BANKS, *supra* note 10, at 2-3.

guide the education of their children to be a fundamental right. The principal contemporary challenges to school laws and regulations are grounded instead upon a claim of violation of a parent's civil rights.²⁰ Although parents have ceased to frame their claims solely in terms of natural rights, the Supreme Court has attempted to establish a constitutional basis for protecting such parental interests.²¹ The Court has acknowledged that the penumbral right of privacy may implicitly encompass these parental prerogatives.²² Accordingly, in *Runyon v. McCrary*,²³ the most recent Supreme Court decision in this area, the Court suggested that separate claims of parental and privacy rights may be variations of a single constitutional right.²⁴ Despite this characterization, the Court stated that the exercise of familial rights in determining the nature of the child's education did not preclude reasonable government regulation.²⁵ Thus, the *Runyon* Court's

²⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207-09 (1972) (freedom of religion); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 504-06 (1969) (freedom of speech); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (establishment of religion); see *Freedom and Public Education*, *supra* note 2, at 533.

²¹ In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), the Supreme Court extended constitutional protection to parents' natural rights under the due process clause of the fourteenth amendment. See text accompanying notes 29-37 *infra*. Subsequent to the application of first amendment liberties through the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), parents have ceased basing their claims of authority over their minor children solely upon natural rights. Various decisions reveal the Court's inability to agree on a constitutional principle encompassing natural rights. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236, 245-47 (1968) (free exercise of religion); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (first amendment right of freedom of speech); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 248 (1963) (Brennan, J., concurring) (due process clause of fourteenth amendment).

²² See *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965). The Supreme Court in *Griswold* noted the absence of any constitutional provisions related to the right to educate the child in a school of the parents' choice, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to study any particular subject or any foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court nevertheless construed the first amendment to include these penumbral rights. 381 U.S. at 482-83. See *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe* the Court declared that the Constitution protected the personal right to privacy. The guarantee of personal privacy extends into activities linked with the family relationship, such as child-rearing and education. *Id.* at 153, citing *Meyer* and *Pierce*. The state, however, may limit these guarantees only if the regulation can be justified by a "compelling state interest." *Id.* at 155. See generally Note, *Runyon v. McCrary: Section 1981 Opens the Doors of Discriminatory Private Schools*, 34 WASH. & LEE L. REV. 179, 194-96 (1977) [hereinafter cited as *Runyon v. McCrary: Section 1981*].

²³ 427 U.S. 160 (1976).

²⁴ *Id.* at 178 n.15. In *Runyon* the Supreme Court held that 42 U.S.C. § 1981 prohibited private, commercially operated non-sectarian schools from practicing discrimination in their admissions programs. The application of section 1981 did not violate the parents' right to direct the education of their children nor the right of free association. *Id.* at 175-79. See generally *Runyon v. McCrary: Section 1981*, *supra* note 22.

²⁵ 427 U.S. at 178. The Court noted that reasonable regulation would not prevent the schools from imparting whatever values and standards they deemed desirable. *Id.* at 177. This right of the parents and the schools, however, will be effective only if the regulation of school conduct does not affect their ability to inculcate such values and standards. Hirschhoff, *Runyon v. McCrary and Regulation of Private Schools*, 52 IND. L.J. 747, 751 (1977) [hereinafter cited as *Private Schools*]; see text accompanying notes 62-68 *infra*.

reaffirmation of earlier decisions which acknowledged the state's power to regulate education²⁶ does not clarify the constitutional status of parental rights. Nevertheless, the trend of recent decisions indicates that education now might be viewed as a reciprocal arrangement between the individual and the state focusing on considerations of political literacy and economic self-sufficiency.²⁷ When the courts are called upon to determine the boundaries between state and parental interests, however, the *Runyon* decision implicitly leads them to rely on the meanings given these terms by state educational legislation and policies.²⁸

State courts' review of educational legislation and regulation has been influenced by earlier Supreme Court decisions involving educational interests. The Supreme Court in *Meyer v. Nebraska*²⁹ declared that the parental privileges recognized at common law were protected by the due process clause of the fourteenth amendment.³⁰ Based upon the doctrine of substantive due process,³¹ the Court concluded that a state law prohibiting the teaching of German abridged the parent's right to control his children.³² In *Meyer*, and in subsequent cases involving educational interests,³³ the Court considered whether the regulations were so irrational as to be arbitrary, and, thus, a deprivation of the parents' interest in the right to direct the upbringing of their children.³⁴ If the parents' interest was unreasonably

²⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

²⁷ *Project: Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1401 (1976) [hereinafter cited as *Education and the Law*]. Although the Supreme Court in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), did not hold the right to receive an education to be a fundamental right, *id.* at 30, 35, many states declare that education is a protected right. *See, e.g., Robinson v. Cahill*, 69 N.J. 133, 147, 351 A.2d 713, 720 (1975), *cert. denied*, 423 U.S. 913 (1976); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 512-13, 585 P.2d 71, 92 (1978). Since *Prince v. Massachusetts*, 321 U.S. 158 (1944), the articulated function of education has been to foster a political and economic growth of the individual. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁸ *Education and the Law*, *supra* note 27, at 1403.

²⁹ 262 U.S. 390 (1923).

³⁰ The fourteenth amendment provides in pertinent part, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST., amend. XIV.

³¹ *See* text accompanying notes 33-37 *infra*.

³² 262 U.S. at 401. In accordance with then existing doctrine, the parents and the teacher in *Meyer* asked for protection against unlawful interference with their property rights in conducting business. These rights were part of the "liberty" protected by the due process clause of the fourteenth amendment. Although the Supreme Court's reasoning focused upon the burden on the teacher's right to teach as an occupation, the Court acknowledged the protected liberty of the parents to direct the upbringing and education of their children. *Id.* at 399-400.

³³ *Farrington v. Tokushige*, 273 U.S. 284 (1927) (regulation of private foreign language schools and teachers declared unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon compulsory public school attendance statute declared unconstitutional); *see* text accompanying notes 62-71 *infra*.

³⁴ 262 U.S. at 400. The *Meyer* Court declared that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within

interfered with by the state, the legislation is an unconstitutional governmental intrusion upon the parents' rights.³⁵ Since the concept of substantive due process implicitly acknowledges the right of the state to promulgate reasonable regulations, the parental right recognized by *Meyer* is a limited one. Although this doctrine has been discarded,³⁶ the parental and state rights recognized by *Meyer* have been consistently reaffirmed by the Supreme Court.³⁷

Parents may find that individual rights conflict with various aspects of the state right to compel education. The most visible manifestation of the state police power in education is the compulsory school attendance statute. In *Wisconsin v. Yoder*³⁸ members of the Amish religion challenged a compulsory education statute requiring formal high school education.³⁹ The parents claimed compliance with this statute after the eighth grade would endanger or destroy the free exercise of their religious beliefs since the imposition of worldly values was inimical to their teachings of salvation.⁴⁰ Although acknowledging the general validity of the compulsory education statute, the Supreme Court held that its application to the Amish resulted in an unconstitutional impingement upon their religious beliefs.⁴¹ Furthermore, the Court held that the Amish had demonstrated the adequacy of their alternative mode of informal vocational education, since the Amish education enabled them to function effectively in both their own community and contemporary society.⁴² The court noted that the Amish were capable of fulfilling the social and political responsibilities of citizenship.⁴³ Since these were precisely the interests advanced by the state to

the competency of the state to effect." *Id.* at 399-400; see *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

³⁵ The doctrine of substantive due process entitled the Supreme Court to weigh the wisdom of legislation. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Thus, the legislative determination of a proper exercise of police power is neither final nor conclusive. Instead, the police power is subject to the supervision of the courts. *Meyer v. Nebraska*, 262 U.S. at 400.

³⁶ See *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952). The justifications for the substantive due process doctrine became less imperative when the Bill of Rights became applicable to the states through the fourteenth amendment. The Supreme Court stated it would no longer allow the invocation of the doctrine to be used as a bootstrap means to thrust a court as a "super-legislature" into debates on issues concerning the public welfare. *Id.*; see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34. But see *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (use of language of substantive due process doctrine).

³⁷ See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 177-78 (1976); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

³⁸ 406 U.S. 205 (1972).

³⁹ Wis. STAT. ANN. § 118.15 (West 1969).

⁴⁰ 406 U.S. at 210-12.

⁴¹ *Id.* at 219.

⁴² *Id.* at 235. The Amish children in *Yoder* completed public schooling through the eighth grade. *Id.* at 210. The parents refused to permit their children to attend the additional one or two years of formal high school necessary to comply with the age limit of the compulsory attendance statute. *Id.* at 207, 210-11.

⁴³ *Id.* at 225.

justify the age requirement of compulsory education,⁴⁴ the state had the burden of demonstrating an interest of sufficient magnitude to defeat a claim for exemption.⁴⁵ The state was unable to meet this burden.⁴⁶

The reasoning of the *Yoder* decision raises questions about the extent of state power to require formal high school education through compulsory education statutes. Traditionally, compulsory education has been viewed as a means to foster cultural unity and good citizenship essential to the stability of the state.⁴⁷ Yet, the *Yoder* decision illustrates that in certain instances the state will be unable to show its interests paramount to the values of a small sectarian group. Once preparation for a life independent of the mainstream of American society becomes a permissible end of education, the state interest in compulsory education seemingly disappears.⁴⁸ This result is further indicated by the *Yoder* court's refusal to accept the state's argument that as *parens patriae* it was empowered to extend the benefits of secondary education to children regardless of their parents' wishes.⁴⁹ In reaching its result the *Yoder* court distinguished the state's right to correct specific identifiable parental abuses of children from the familial role of socializing the children.⁵⁰ Under the singular facts of the *Yoder* case, the Court chose to strengthen parental authority.⁵¹ By the use

⁴⁴ See note 16 *supra*.

⁴⁵ 406 U.S. at 214. The Supreme Court's adoption of the balancing process weighing the state's interest in universal education against personal rights was a distinct break with prior judicial analysis. The Court previously had held activities of individuals, even when religiously based, to be subject to regulation by the state as *parens patriae*. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1879). In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court rejected constitutional distinctions between belief and action when claims of conduct protected by the free exercise clause of the first amendment were alleged to challenge state regulation. *Id.* at 402-03; see 406 U.S. at 220. Thus, the state's interest in universal compulsory education is not absolute to the exclusion of all other interests. *Id.* at 215, citing *Sherbert v. Verner*.

⁴⁶ *Id.* at 235-36.

⁴⁷ See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902); note 16 *supra*.

⁴⁸ 406 U.S. at 222. Although compulsory education beyond the eighth grade may be necessary when the child is to be prepared for life in modern society, the Court questioned the necessity of further education when the goal of education was preparation for life in a separated agrarian community. *Id.*; see *Freedom and Public Education*, *supra* note 2, at 530.

⁴⁹ See text accompanying notes 42-44 *supra*. Compulsory attendance statutes were promulgated initially to protect the child from the evils of child labor. The laws incorporated the premise that it was the natural duty of the parent to educate the child. Woltz, *Compulsory Attendance of School*, 20 LAW AND CONTEMP. PROB. 3, 20 (1955). With the increased recognition of the necessity of education to both the child and society, the state courts upheld the compulsory attendance statutes on the grounds that the parents had no right to deprive their children of the "blessings of education." See *Commonwealth ex rel. School Dist. of Pittsburgh v. Bey*, 166 Pa. Super. 136, 140, 70 A.2d 693, 695 (1950); *People v. Levisen*, 404 Ill. 574, 577, 90 N.E.2d 213, 215 (1950); *Parr v. State*, 117 Ohio St. 23, —, 157 N.E. 555, 556 (1927).

⁵⁰ 406 U.S. at 229-30. The correction of child abuse is a justified use of state police power. However, the role of the family as the primary agency in the socialization process was usurped by the state through compulsory attendance statutes. See Riga, *Yoder and Free Exercise*, 6 J. LAW & EDUC. 449, 469 (1977).

⁵¹ See Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623, 628-30

of sweeping language the Court implicitly qualified the notion that education is the business of the state by undercutting the justifications for statutory restrictions on common law parental rights.

Despite the arguable rejuvenation in *Yoder* of common law parental rights, the decision has had little impact upon the application of state compulsory education laws. The ambiguity of the balancing test established by the Court allows lower courts flexibility in interpreting the standard of review.⁵² The traditional standard of review of state regulation "requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."⁵³ Where a state statute or educational practice impinges upon a fundamental right, the state must show a compelling and legitimate interest which necessitates continued enforcement of the statute or regulation.⁵⁴ Although the *Yoder* Court arguably used the compelling interest standard, a balancing test weighing state interests with individual claims may be interpreted to be a distinct standard of review.⁵⁵ This ambiguity in the *Yoder* decision allows a court, if it chooses to protect the state's pluralistic interests in education, to shift the burden of persuasion to the parents, even though their claim alleged abridgment of fundamental rights.⁵⁶

The *Yoder* Court focused upon the legitimacy of the free exercise claims raised by the Amish in view of the alternative education offered by the sect.⁵⁷ The Court pointed out that philosophical values or personal choice

(1975) [hereinafter cited as Moskowitz].

⁵² See *Davis v. Page*, 385 F. Supp. 395, 399 (D.N.H. 1974). But see *State v. Whisner*, 47 Ohio St. 2d 181, 217 n.17, 351 N.E.2d 750, 771 n.17 (1976).

⁵³ *Scoma v. Chicago Board of Educ.*, 391 F. Supp. 452, 462 (N.D. Ill. 1974); *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975). The plaintiff in *Baker* alleged that the administration of corporal punishment over her objections violated her parental right to guide the upbringing of her child. *Id.* at 295. Noting the failure of the Supreme Court to recognize parental rights as fundamental, the district court ruled that the state did not need to show a countervailing state interest which outweighed the plaintiff's rights. *Id.* at 296. The parental rights protected by *Meyer* and *Pierce* would prevail only when the state's action was arbitrary and without reasonable relation to an end legitimately within state power. *Id.* at 299.

⁵⁴ See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634-38 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

⁵⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). But see *Davis v. Page*, 385 F. Supp. 395, 399-400 (D.N.H. 1974).

⁵⁶ See *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Education and the Law*, *supra* note 27, at 1395.

⁵⁷ 406 U.S. at 219, 235. Amish existence for three centuries as an identifiable religious sect supported the parents' free exercise claim. *Id.* at 235. Moreover, the informal vocational education provided by the Amish in lieu of one or two years of high school education sufficiently addressed the interests of the state. *Id.* Justice White noted that a very different case would exist if the religious claim forbade the children either from attending school or complying with state education standards. *Id.* at 238 (White, J., concurring).

The *Yoder* majority commented that the convincing showing of the Amish of a satisfactory alternative education was one that few other religious groups or sects could make. *Id.* at 235; see, e.g., *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974). Applying the *Yoder* rationale, the district court in *Davis* refused to exempt students from certain courses despite the parents' claim that the method of teaching infringed upon their free exercise of religion. *Id.* at

based upon purely secular considerations are not entitled to constitutional protection.⁵⁸ A claim that parents have the right to educate their children "as they see fit" and "in accordance with their determination of what best serves the family's interest and welfare" is not entitled to protection as a claim of a fundamental constitutional right.⁵⁹ When confronted with a non-fundamental claim the state must only demonstrate that its requirements are reasonable in order to establish the validity of the application of its compulsory education law.⁶⁰ If the parents successfully establish a free exercise claim they also must show that they provide an alternative education which is equivalent to public schooling.⁶¹ If the parents fail to prove an adequate alternative, the courts should assume in light of *Yoder* that the state interest in education is of sufficient magnitude to override an infringement of a parent's fundamental right.

Although the state may regulate non-public schools, it cannot pre-empt the parent's constitutionally protected choice of educational alternatives. In *Pierce v. Society of Sisters*⁶² the Supreme Court held that a state cannot require every parent to send his child to a public school.⁶³ The state's interest in secular education may be satisfied by private educational efforts.⁶⁴ Nevertheless, because the state has an interest in the manner in which public and non-public schools perform the secular education functions,⁶⁵ *Pierce* does not entitle the parents to substitute their views of the

406. The court distinguished *Yoder* on the basis that the children in *Davis* were elementary school students, and because there was no evidence that the children were being prepared by their parents for an existence in an isolated and independent community. *Id.* at 398, 400. *But see* *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); text accompanying notes 72-86 *infra*.

⁵⁸ 406 U.S. at 215-16. The subjective evaluation and rejection of contemporary secular values would not create a claim resting on a religious basis. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.*; see, e.g., *Matter of McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976) (deep rooted conviction for Indian heritage not on equal constitutional plane with religious beliefs and thus not protected by the first amendment).

⁵⁹ See *Scoma v. Chicago Board of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974). In *Scoma*, the parents filed a suit under 42 U.S.C. § 1983 (1976) seeking to enjoin the school board from interfering with the parents' decision to educate their children at home. *Id.* at 455. The *Scoma* court incorrectly reasoned that parental rights under *Yoder* did not rise above a personal or philosophical choice. See *id.* at 461. The court correctly concluded, however, that the right to guide the child's education was not a fundamental right and, therefore, the parents were not entitled to the first amendment protection which had been accorded to the Amish in *Yoder*. *Id.* at 461-62.

⁶⁰ See, e.g., 391 F. Supp. at 461. Except in situations where free exercise claims are invoked, a court's conclusions based upon a *Yoder* analysis are identical to results provided by the "reasonableness" standard of personal substantive due process as applied by the *Scoma* court. See *id.*

⁶¹ See 406 U.S. at 213, 235. *Yoder* requires an alternative education which fulfills the requirements of the state educational interests in order to be exempt from state compulsory high school education. See text accompanying notes 96-98 *infra*.

⁶² 268 U.S. 510 (1925).

⁶³ *Id.* at 534-35; see text accompanying notes 29-37 *supra*.

⁶⁴ See *Board of Educ. v. Allen*, 392 U.S. 236, 247 (1968).

⁶⁵ See *id.* The state has the power to insist that compliance with state compulsory

welfare interest of society for the educational requirements of the state.⁶⁶ If the state requirements are met, the state may not restrict the liberty of non-public schools to teach whatever values or subject matter they wish.⁶⁷ Essentially, the state cannot diminish the attractiveness of an alternative educational process.⁶⁸

State supervision and control over non-public education cannot go beyond "mere regulation."⁶⁹ Accordingly, public officials do not have the right to give affirmative directions "concerning the intimate and essential details" of private schools either in the school's management or in the parents' and schools' reasonable choice of teachers, curriculum and textbooks.⁷⁰ In determining whether the state has gone beyond "mere regulation," the standard of review is whether the regulations are "arbitrary,

attendance laws include attendance at institutions which provide minimum hours of instruction, employ teachers with specified training, and cover prescribed subjects of instruction. *Id.* at 245-46; *accord*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (state may require certain courses of instruction).

⁶⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring). The defendants in *Pierce*, a private parochial school and military academy, were in complete compliance with the education standards set by the state. 268 U.S. at 533. Therefore, the state's power to promulgate education standards was not challenged. *Id.* at 534. The Court's inquiry focused on the reasonableness of the compulsory attendance statute. *Id.*; *see text* accompanying notes 33-37 *supra*.

⁶⁷ *Runyon v. McCrary*, 427 U.S. 160, 177 (1976).

⁶⁸ *See id.*, *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). The parents in *Schempp* objected to a Pennsylvania law requiring school classes to begin each day with readings from the Bible. *Id.* at 205. Although individual students were excused upon parental request, the Supreme Court ruled that the lack of coercion did not furnish a defense to a claim of violation of the establishment clause of the first amendment. *Id.* at 224-25. The state cannot jeopardize the freedom of the public schools from private or sectarian pressures, nor may the state restrict the liberty of private schools to inculcate whatever values they wish. Either circumstance would inhibit the parent's freedom to choose the schooling for his child. *Id.* at 242 (Brennan, J., concurring). In *Runyon*, the school's right to inculcate racially discriminatory beliefs was not challenged. 427 U.S. at 177. Schools remain presumptively free, the Court declared, to teach whatever values and standards they deem desirable. *Id.* *But see* note 25 *supra*.

The state legislature, however, may require subjects of instruction which private school authorities or parent patrons believe unnecessary or harmful. Further, the legislature may require the schools to utilize methods of instruction which are contrary to a non-public school's particular educational philosophy. *Private Schools*, *supra* note 25, at 754.

⁶⁹ *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927). *Farrington*, *Meyer*, *Pierce* and *Yoder* are the only decisions of the Supreme Court which have directly confronted parental claims to the freedom of private schooling. Although the Court in *Farrington*, *Meyer* and *Pierce* relied upon a substantive due process rationale, the cases remain the principal decisions which establish constitutional limits on state control of private education. *See text* accompanying notes 29-37 *supra*. In *Farrington*, parents challenged Hawaii laws regulating private foreign language schools. 273 U.S. at 290. Although the children attended public schools in compliance with the compulsory attendance law, the state completely regulated the hours, curriculum, textbooks, and qualifications of pupils and teachers, necessary for the private schools to obtain operating permits. *Id.* at 291-96. Enforcement of these laws, the Supreme Court ruled, deprived the parents of the right to procure instruction for their children which the parents deemed important and could not be declared harmful. *Id.* at 298.

⁷⁰ *Id.*

discriminatory, oppressive and otherwise unreasonable."⁷¹

Minimum state standards for private schools prescribed by the Ohio State Board of Education were recently challenged in *State v. Whisner*.⁷² In *Whisner*, defendants, a "born-again" religious school, alleged that the application of Ohio's compulsory attendance laws⁷³ to enforce the state board regulations⁷⁴ infringed upon the defendants' free exercise of religion.⁷⁵ The Ohio Supreme Court declared that the minimum standards effectively "obliterated" the parochial school's philosophy and imposed the philosophy of the state.⁷⁶ In interpreting the Federal constitution, the court held that since the school and the parents had demonstrated that their religious beliefs had been infringed, the "minimum standards" were unconstitutional.⁷⁷ The court also noted that the all-pervasive nature of the regulations furnished an additional, independent ground for upholding the defendants' constitutional challenge.⁷⁸ The state was unable to establish an interest of sufficient magnitude overriding the free exercise claims of the school and the parents.⁷⁹

The *Whisner* court reasoned that the state's interest in a general education of high quality could be achieved by means other than the comprehensive regulation of all educational efforts.⁸⁰ Although relying on *Wisconsin*

⁷¹ See text accompanying notes 29-37 *supra*; see, e.g., *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960) (state regulation of solicitors for private business school cannot unreasonably interfere with their personal liberty).

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

⁷³ OHIO REV. CODE ANN. § 3321.03 (Page 1972) provides that the parent "shall cause such child to attend a school which conforms to the minimum standards prescribed by the state board of education"

⁷⁴ OHIO REV. CODE ANN. § 3301.07(D) (Page 1972) provides that the state board of education "shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality."

⁷⁵ 47 Ohio St. 2d at 200-11, 351 N.E.2d at 762-67. The parents and the school in *Whisner* objected to four of the state's "minimum standards" set forth in *Minimum Standards for Ohio Elementary Schools* (Rev. 1970). The defendants complained that the minimum instructional time allocation failed to allot time for religious training and was, therefore, inimical to the fundamental purpose of a religious school. The defendants also viewed the required conformance to board of education policies as providing public authorities with a blank check to control the school operation. Finally, the religious school would only provide quality education by seeking direction from the defendants' own values, not through required cooperation and interaction with the community. As a result, the defendants refused to obtain a charter because acceptance would constitute an agreement to comply with all the standards. *Id.* at 201-02, 351 N.E.2d at 762-63.

⁷⁶ *Id.* at 215-16, 351 N.E.2d at 770.

⁷⁷ *Id.* at 211, 351 N.E.2d at 767.

⁷⁸ *Id.* at 211-18, 351 N.E.2d at 768-71.

⁷⁹ *Id.* at 215-18, 351 N.E.2d at 770-71. The combination of parental interests with a free exercise claim meant that the state needed to demonstrate an interest of sufficient magnitude to override the defendants' claims. The Ohio Supreme Court reasoned that the *Yoder* Court did not intend to depart from a test of "compelling state interest" as the proper standard of review to determine whether the statute could be sustained. *Id.* at 217 n.17, 351 N.E.2d at 771 n.17.

⁸⁰ *Id.* at 216-17, 351 N.E.2d at 771.

v. Yoder,⁸¹ the court failed to determine whether the defendants' religious faith and mode of life were "inseparable and independent."⁸² The *Yoder* Court regarded this determination as indicative of whether the defendants' claim was merely a matter of personal preference, or one of deep religious conviction intimately related to daily living.⁸³ Furthermore, the *Whisner* court did not articulate why the defendants' concept of education could be substituted for the state's policies.⁸⁴ Instead, the court placed the burden on the state to demonstrate the lack of alternatives to serve the state's educational interests.⁸⁵ Although free exercise of religion is a fundamental constitutional right, the right to guide a child's education is not.⁸⁶ The *Whisner* court's rigid application of the compelling interest standard of review precluded the court's consideration of the balancing factors required by *Yoder*. Typically, the state interest in elementary education is accorded greater weight than the *Whisner* court granted in applying the *Yoder* decision. Since the Ohio court greatly extended the *Yoder* rationale in protecting the parents' rights, the *Whisner* opinion may not offer an accurate indication of the Federal constitutional limits of state regulation of private education.

Non-public schools presumptively remain free to experiment and disagree with values and standards taught in the public schools.⁸⁷ Non-public education, nevertheless, must serve the public interest.⁸⁸ Although the most effective means of satisfying the state's responsibility for education is a state supported and operated educational system,⁸⁹ the states rarely impose unreasonable regulation on non-public schools.⁹⁰ Typically, compulsory education statutes are used to enforce compliance with various state requirements.⁹¹ The statutes either specifically authorize attendance

⁸¹ 406 U.S. 205 (1972); see text accompanying notes 38-61 *supra*.

⁸² The court did not inquire into the religious nature of the defendants' beliefs. See Note, *State v. Whisner*, 37 OHIO ST. L. J. 899, 903-06 (1976).

⁸³ 406 U.S. at 215-16.

⁸⁴ In contrast to the Amish in *Yoder*, the defendants in *Whisner* made no showing that the goal of the private education was to prepare their children for life in a separated and isolated community. See *id.* at 222. Moreover, the Amish children had completed eight grades of compulsory state education. The state interest in providing children with the basic tools of literacy at the elementary level may be of sufficient magnitude to override any impingement of constitutional rights. See *id.* at 237-41 (White, J., concurring).

⁸⁵ 47 Ohio St. 2d at 216-18, 351 N.E.2d at 771.

⁸⁶ See text accompanying notes 20-28 *supra*.

⁸⁷ *Runyon v. McCrary*, 427 U.S. 160, 177 (1976).

⁸⁸ O. KRAUSHAUR, *AMERICAN NON-PUBLIC SCHOOLS: PATTERNS OF DIVERSITY* 315 (1972) [hereinafter cited as KRAUSHAUR]; see text accompanying notes 9-19 *supra*.

⁸⁹ See T. GEEL, *AUTHORITY TO CONTROL THE SCHOOL PROGRAM* 8-11, 153 (1976) [hereinafter cited as GEEL]. But see P. GOODMAN, *COMPULSORY MISEDUCATION* (1964); Moskowitz, *supra* note 51, at 635-36.

⁹⁰ KRAUSHAUR, *supra* note 88, at 314.

⁹¹ GEEL, *supra* note 89, at 153-65. The states may use several methods to enforce regulation of private schools. If the school must register, the state can either force compliance by the private school or the state may prosecute parents who send their children to non-approved schools. However, if the compulsory education statute does not require equivalence between the public and non-public schools the state will have difficulty demonstrating a statutory

at private schools or require that alternative education be equivalent to the academic programs offered in the public schools.⁹² Moreover, several states require private schools to obtain prior certification from the state board of education before the children attending the school will be deemed to be in compliance with the compulsory attendance statute.⁹³ These varied statutory schemes are applied by the local boards of education which are responsible for the daily operations of the schools within their districts.⁹⁴ Local attitudes often determine the effectiveness of state policies and requirements.⁹⁵ As a result, state regulation ranges from almost total control to minimal involvement in the private educational process.

Home instruction is an alternative private educational effort to organized public education. Although *Pierce* provides parents with a constitutionally protected opportunity to seek a reasonable alternative to public education, home instruction has not been afforded such protection. Proper exercise of the broad parental powers seemingly revived by *Yoder* may fulfill the traditional state interests which have been advanced to prohibit home education. If the state interest is limited to adequate instruction of the children, the facilities provided should be of no consequence.⁹⁶ Most

violation by the parents.

If the schools need not register, the state can only control the schools indirectly by prosecuting parents for violating the compulsory education statutes. However, if there are no required standards of equivalence the state may not be able to prosecute at all, and, as a result, the control of private education is nearly impossible. *Id.* at 154-55 (table of state statutes).

⁹² *E.g.*, ARK. STAT. ANN. § 80-1502 (1960) ("shall send such child to a public, private, or parochial school"); ME. REV. STAT. tit. 20 § 911(3) (West Cum. Supp. 1978) (compulsory attendance in public school excused if student obtains equivalent instruction in private school).

⁹³ *E.g.*, R.I. GEN. LAWS § 16-19-2 (1970); S.C. CODE § 59-65-10 (1977). *See* United States Reading Lab., Inc. v. Brockette, 551 S.W.2d 531, 533 (Tex. Civ. App. 1977) (requirement of certificate of approval is reasonable exercise of legislative power). *But see* State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976). In *LaBarge*, the children were attending a private school not yet approved under state law. The Vermont Supreme Court declared that the term "equivalent education" was a distinct concept from school approval. Under Vermont law approval may be denied for reasons unrelated to equivalency (e.g. financial capacity or lack of special services). *Id.* at ____, 357 A.2d at 125; VT. STAT. ANN. tit. 16 § 166 (1974). The court, therefore, upheld the lower court's dismissal of the case because the department of education had made no determination of equivalency. 134 Vt. at ____, 357 A.2d at 123.

⁹⁴ R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS* 54-59 (1965). The state legislature usually considers only basic policy questions. The state board of education establishes standards within the legislative guidelines. In recognition of local autonomy, the states delegate control over actual operation to the district school boards. The local boards must observe state minimums (e.g. courses, hours of instruction). *Id.* at 53-70.

⁹⁵ Members of the school board are subject to varying pressures when deciding important educational matters. *See* R. BENDINER, *THE POLITICS OF SCHOOLS* 36-39 (1969); Gross, *Who Controls the Schools?*, *EDUCATION AND PUBLIC POLICY* 25-26 (1964). As a result, significant local diversity can be maintained within the state's uniform educational system. CONANT, *supra* note 2, at 15-16. As a further consequence of this diversity, private school supervision often is not extensive. *See generally* KRAUSHAUR, *supra* note 88, at 314; D. ERIKSON, ed., *PUBLIC CONTROLS FOR NON-PUBLIC SCHOOLS* (1969).

⁹⁶ The *Yoder* decision may be read to protect broad parental powers which may be

states, however, continue to view socialization of the child as a fundamental function of formal educational institutions.⁹⁷ Neither *Pierce* nor *Yoder* disputed the state's interest in institutionalized education.⁹⁸ If *Yoder* is applicable to the parents' right to home instruction, the compelling interest of the state in socialization would still permit the state to establish reasonable regulations which could effectively foreclose this alternative mode of education. Thus, the question of whether home instruction is a reasonable alternative has been left to the state legislatures.

Most states require that compulsory education be satisfied by regular attendance at an organized institution.⁹⁹ Although a compulsory attendance statute may not specifically authorize home instruction or private tutoring, the statute may entitle the parent to provide equivalent education.¹⁰⁰ Non-institutional instruction must be "equal in value to that given in the public school."¹⁰¹ The determination of the standards necessary to achieve equivalence has been left to the courts. A showing of compliance with all the state education requirements is generally sufficient. In several states, however, despite such compliance, the courts have not allowed home instruction unless local school board authorities have granted prior

restricted only in certain circumstances. See text accompanying notes 47-49 *supra*. The state could measure the progress of children in the basic subjects by use of standardized tests. Therefore, the only state interest entitled to constitutional sanction might be in adequate education, not institutional instruction. See Moskowitz, *supra* note 51, at 630-36.

⁹⁷ *Education and the Law*, *supra* note 27, at 1397-98. But see *State v. Massa*, 95 N.J. Super. 382, 387-90, 231 A.2d 252, 255-57 (1967).

⁹⁸ See *Wisconsin v. Yoder*, 406 U.S. at 213, 235. The parents in *Yoder* did not challenge the state's right to compel formal education through the eighth grade in a state approved school. The Court held only that the Amish had established the adequacy of their mode of alternative education in comparison to the state interests in the last two years of formal education. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

⁹⁹ In several states the school must be an institution "consisting of a teacher and pupils . . . gathered together for instruction in any branch of learning." *State ex rel. Shoreline School Dist. No. 412 v. Superior Court*, 55 Wash. 2d 117, ___, 346 P.2d 999, 1002, *cert. denied*, 363 U.S. 814 (1960). The guidelines for determination of a qualified private school, the Washington Supreme Court stated, are established by the minimum standards set by the legislature for the public common schools. *Id.* at ___, 346 P.2d at 1003. See, e.g., *State v. Counort*, 69 Wash. 361, 363-64, 124 P. 910, 911-12 (1912) (school is "regular, organized and existing institution" making business of instructing in required studies full time); *State v. Garber*, 197 Kan. 567, ___, 419 P.2d 896, 900 (1966); *In Re Davis*, 114 N.H. 242, ___, 318 A.2d 151, 152 (1974).

Other states do not limit adequate educational instruction to an institutional setting. See, e.g., *State v. Peterman*, 32 Ind. App. 665, ___, 70 N.E. 550, 551-52 (1904). The *Peterman* court held instruction by a private tutor, if equal to education in the public schools, to constitute compliance with the compulsory education statute. "[T]he number of persons, whether one or many," does not "make a place where instruction is imparted any less or more a school." *Id.* at ___, 770 N.E. at 551; *accord*, *People v. Turner*, 277 App. Div. 2d 317, 319, 98 N.Y.S.2d 886, 888 (1950) (object of compulsory education law is to see that children receive instruction from some source); *People v. Levisen*, 404 Ill. 574, ___, 90 N.E.2d 213, 215-16 (1950) (home education meeting all statutory requirements is "private school").

¹⁰⁰ E.g., IOWA CODE ANN. § 299.1 (West Cum. Supp. 1978) (equivalent instruction in lieu of attendance at public school).

¹⁰¹ *Stephens v. Bongart*, 15 N.J. Misc. 80, ___, 189 A. 131, 134 (1937).

approval,¹⁰² or unless parents have provided a certified tutor.¹⁰³ If the court determines that "equivalent" refers to equivalence of social development as well as academic equivalency, the child can only be educated in a group which would constitute a de facto school.¹⁰⁴ The viability of home education remains dependent upon the educational philosophy of the state courts and the attitudes of the community as reflected in the local school boards which must enforce the truancy statutes.

When the state charges a parent with violation of the compulsory education statutes, the parent must introduce evidence showing that an equivalent, alternative education has been substituted for organized education.¹⁰⁵ The court initially will examine the parents' ability to provide equivalent instruction.¹⁰⁶ The courts generally require the quality, character and methods of teaching provided by the parents to be comparable to that offered by the local school district.¹⁰⁷ In *In Re Franz*¹⁰⁸ a mother demonstrated that she was competent to teach her child although she did not have formal qualification.¹⁰⁹ The New York Family Court ruled, however, that one and one-half hours of instruction per day in a formal setting was not sufficient to satisfy the minimal hours of instruction required by the state.¹¹⁰ The court found further support for this result in the parents' failure to establish a systematic plan of instruction encompassing the courses of study required by the state.¹¹¹ In evaluating home instruction, the courts consider the number of hours of instruction, the regularity of instruction, the nature of the materials used and the methods used to determine academic achievement.¹¹²

¹⁰² See, e.g., *Commonwealth v. Renfrew*, 332 Mass. 492, 126 N.E.2d 109 (1955); *Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342 (1948).

¹⁰³ See, e.g., *In Re Shinn*, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); *F&F v. Duval County*, 273 So.2d 15 (Fla. App. 1973).

¹⁰⁴ See *State v. Massa*, 95 N.J. Super. 382, 387, 231 A.2d 252, 255 (1967). In *Massa*, the parents were charged with failure to provide their child with an equivalent education by educating the child at home. The New Jersey court rejected the argument that a certain number of students must be present in order to attain an equivalent education. The purpose of the compulsory education statute was not to require that children be educated in a particular way. *Id.* at 389-90, 231 A.2d at 256. The parents need show no more than equivalent academic instruction in their teaching program when compared to the education provided by the local public school system. *Id.* at 390-91, 231 A.2d at 257.

¹⁰⁵ E.g., *id.* at 386, 231 A.2d at 254.

¹⁰⁶ E.g., *Stephens v. Bongart*, 15 N.J. Misc. 80, —, 189 A. 131, 134 (1937).

¹⁰⁷ *Id.*

¹⁰⁸ 84 Misc. 2d 914, 378 N.Y.S.2d 317 (1976), *aff'd*, 55 App. Div. 2d 424, 390 N.Y.S.2d 940 (1977).

¹⁰⁹ *Id.* at 917-18, 378 N.Y.S.2d at 321.

¹¹⁰ *Id.* at 920-22, 378 N.Y.S.2d at 323-25; see N.Y. EDUC. LAW § 3210(2) (McKinney 1970).

¹¹¹ 84 Misc. 2d at 920-21, 378 N.Y.S.2d at 323-24. The standard of instruction and the subject matter to be taught must conform to the standards imposed by the school board in order to establish the equivalency of education. *Id.* at 916, 378 N.Y.S.2d at 320; see N.Y. EDUC. LAW §§ 3204(2) (instruction by competent teacher), 3204(3)(a)(1) (required courses of study), 3210(2) (hours of instruction) (McKinney 1970).

¹¹² Courts in New Jersey and New York have recently decided cases involving the standards of equivalence which must be met by parents choosing to educate their child at home.

Whether or not the child attends a public school or non-public school, the state retains the power to impose minimal, uniform curriculum requirements. *Meyer v. Nebraska*¹¹³ limits state authority over the curriculum by requiring state prohibition of courses of study to have a rational basis. Although the *Meyer* decision demonstrates that state control over the curriculum is not absolute, the opinion establishes no further guidelines.¹¹⁴ The indefiniteness caused by the lack of constitutional parameters is magnified by the reluctance of federal and state courts to decide claims which they consider to exclusively concern issues of educational expertise.¹¹⁵

The states traditionally were entitled to require that studies plainly essential to "good citizenship" be taught to every child.¹¹⁶ Generally, however, the common law courts protected the values of the parents. Thus, if a court determined that a course did not satisfy this flexible standard, the parents had the right to select what their child should learn.¹¹⁷ When parental values which were not inimical to the interests of citizenship clashed with a prescribed course, the child was granted an excusal from the class.¹¹⁸ The parents did not have the right, however, to have their

Although neither New Jersey nor New York requires that the parents hold teaching certificates, the threshold determination of the court is whether the parent is competent to teach in the subjects required by the state. *See, e.g., State v. Massa*, 95 N.J. Super. 382, 231 A.2d 252 (1967); *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (1937); *In Re Franz*, 84 Misc. 2d 914, 378 N.Y.S.2d 317 (1976); *In Re H*, 78 Misc. 2d 412, 357 N.Y.S.2d 384 (1974).

Difficulty arises, however, because the burden of proof of compliance or non-compliance with the state compulsory education law varies among the states. *See, e.g., State v. Massa*, 95 N.J. Super. at 386, 231 A.2d at 254-55. In New Jersey, violation of the compulsory education statute is a quasi-criminal offense, and a violator is subject to a fine. N.J. STAT. ANN. § 18A:38-31 (West 1968). The state must establish its burden of proof beyond a reasonable doubt. *But see In Re Franz*, 84 Misc. 2d at 915-16, 378 N.Y.S.2d at 319-20. In New York, provisions of the education act apply under the child neglect laws, N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1975). Therefore, the burden of proof lies with the parent at a neglect proceeding. However, the use of child neglect statutes to pursue non-attendance in school may not be appropriate when the parents' provision of equivalent education is at issue. *See In Re Davis*, 114 N.H. 242, —, 318 A.2d 151, 152 (1974).

¹¹³ 262 U.S. 390 (1923).

¹¹⁴ *See* text accompanying notes 29-36 *supra*.

¹¹⁵ *See* text accompanying notes 128-33 *infra*.

¹¹⁶ *See* text accompanying notes 6-9 *supra*.

¹¹⁷ *E.g., State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914). The common law courts granted broad parental control in the choices of studies for the child because the parents were supposed to have a more substantial interest in their child's welfare than the mere temporary interest of the school. Compulsory education statutes signified the states' recognition that the parent's interest was not always aligned with the child's. *See* note 49 *supra*.

¹¹⁸ *E.g., Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921). The *Hardwick* court determined that the parent's wishes for excusal of his child would not interfere with the established school discipline. *Id.* at —, 205 P. at 54. Judicially or legislatively created exemptions do not create enormous administrative difficulties. The demand for provision of courses not available in the school program, however, creates enormous administrative problems. *See, e.g., Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974). *But see* MASS. GEN. LAWS ANN. ch. 71 § 13 (West Cum. Supp. 1978) (parent's right to petition for curricular additions).

children receive instruction in areas of study other than the offered courses of the school.¹¹⁹ Common law parental rights have weakened with the decline of the substantive due process doctrine and the increasing educational demands of an advanced industrial society.¹²⁰ Despite the proliferation of minimum curriculum requirements the courts have become increasingly reluctant to exempt students from required courses that are taught within constitutional limits.¹²¹

The methodological requirements of the curriculum serve the state's interest in fulfilling its own educational goals through efficient and effective instruction. The methods of instruction often create conflicts between parental and state interests similar to those raised by required courses of study. In *Davis v. Page*¹²² the parents objected to the school board's refusal to allow their children to withdraw from courses employing audio-visual equipment. The parents, who were Apostolic Lutherans, contended that the exposure to audio-visual aids was contrary to their religious teachings. The parents urged that the school board's refusal to excuse their children from such classes abridged their right to raise their children according to the dictates of their religion.¹²³ After determining that the use of audio-visual equipment was an integral part of the educational process, the district court upheld the refusal to allow the children to withdraw.¹²⁴ The court did not regard the provision of a separate course which did not use audio-visual equipment as an acceptable alternative. This opinion illustrates that often the state interest in maintaining a coherent and comprehensive education program surpasses parental interests.¹²⁵

¹¹⁹ *E.g.*, *State ex rel Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (1891). In *Sheibley*, the Nebraska Supreme Court noted the necessity for efficiency in school operations. *Id.* at —, 48 N.W. at 394. Under *Sheibley*, the parent does not have the right to require sacrifice of other children's interests for the sake of his own child's interests. *Id.* Thus, the parent could not demand that his child receive methods of study distinct from those adopted by the school board. *See, e.g.*, *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 36 S.E. 920 (1900) (question of whether particular subject is suited to age of pupil is question for determination by school authorities).

¹²⁰ *See* note 2 *supra*.

¹²¹ *See, e.g.*, *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970). The district court declared that once the school board determines that a particular course is necessary for the education of one child, the course is necessary to the education of all students. *Id.* at 433. The *Vaughn* court, therefore, refused to grant a requested course exemption. *Id.* at 434.

¹²² 385 F. Supp. 395 (D.N.H. 1974).

¹²³ *Id.* at 397-98. The parents in *Davis* also claimed that mandatory health and music courses infringed upon their right of free exercise of religion. The district court held, however, that the parents had failed to demonstrate a constitutionally significant burden on their free exercise of religion because they could not establish specific tenets which would be violated by the children's attendance at these classes. *Id.* at 405.

¹²⁴ *Id.* at 399-401. Rather than requiring a showing of compelling state interest, the district court stated that the balancing test of *Wisconsin v. Yoder*, 406 U.S. at 214-15, should be applied. 385 F. Supp. at 399. The court pointed out, however, that the situation was not comparable to *Yoder* because the children were elementary school students and the parents were not preparing the children for an existence in an isolated and independent community. *Id.* at 400.

¹²⁵ 385 F. Supp. at 404-06.

The *Davis* and *Whisner* decisions highlight the ambiguity of the balancing test established by the Supreme Court in *Wisconsin v. Yoder*.¹²⁶ *Yoder* and *Whisner* protected the parent's right to mold his child's beliefs. The *Davis* court, however, aligned the state's interest with the child's in opposition to parental interests. This traditional view of the state's *parens patriae* role in education meant that the pluralistic values of community education would be of sufficient magnitude to override the parents' claim for exemptions. Except in limited circumstances involving first amendment rights, exemption from a course does not provide an automatic solution to the clash between individual values of the parent and the pluralistic values of the community. The courts are reluctant to create special curriculum exemptions to remedy a particular encroachment upon an individual's rights.¹²⁷ The need for an efficient public school system often serves as a compelling interest.

As indicated by recent decisions, parents are no longer considered to be the primary judges of their child's educational interests.¹²⁸ As a result, judicial deference to school board expertise will continue even in the face of a constitutional claim.¹²⁹ Federal and state courts are reluctant to intervene in debates over issues of educational policy because the courts possess no marked or controlling competence in the field.¹³⁰ Matters solely within the administrative expertise of education officials are not judicially cognizable.¹³¹ If no fundamental rights are infringed by an educational program, the court's inquiry will be limited to whether the school board has acted in a reasonable exercise of its power and discretion.¹³² Safeguarding of

¹²⁶ See text accompanying notes 52-56 *supra*.

¹²⁷ 385 F. Supp. at 404-06. The *Davis* court emphasized the general needs of a system of education over a policy which allowed parents and children to "pick and choose" which courses they wanted to attend. The court feared this would result in a stratified and chaotic school structure. *Id.* at 405; *accord*, *Mitchell v. McCall*, 273 Ala. 604, ___, 143 So.2d 629, 632 (1962). The plaintiffs in *Davis* offered no instructional alternative to satisfy the state's overwhelming interest in elementary education. If the courts continue to insist upon protecting community and state interests, the individual values protected by *Yoder* would only be protected in circumstances analogous to *Yoder*. *But see Public School Curriculum*, *supra* note 2.

¹²⁸ See, e.g., *Keefe v. Geankos*, 418 F.2d 359, 361-62 (1st Cir. 1969); *BANKS*, *supra* note 10, at 2-3.

¹²⁹ Courts have continually reiterated that the courtroom is not the proper place for debating issues of educational policy. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 598 (1940); *President's Council v. Community School Bd.*, 457 F.2d 289, 292 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). See also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Baker v. Owen*, 395 F. Supp. 294, 301 (M.D.N.C. 1975).

¹³⁰ *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

¹³¹ *In Re Baum*, 86 Misc. 2d 409, 413, 382 N.Y.S.2d 672, 675 (1976), *aff'd*, 61 App. Div. 2d 123, 401 N.Y.S.2d 514 (1978). The parent must exhaust all avenues of administrative appeal unless the child is exposed to a situation which threatens his health, safety or welfare. *Id.* at 413, 382 N.Y.S.2d at 675. The courts are unwilling to hinder the discretion of school officials in deciding the methods to be used in accomplishing legitimate educational purposes by judicially resolving disputes between the parents and the schools. See, e.g., *Baker v. Owen*, 395 F. Supp. 294, 301 (M.D.N.C. 1975); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 543-44, 92 N.Y.S.2d 344, 346 (1949).

¹³² See, e.g., *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966). *Meyer and Pierce*

academic freedom, however, remains a special first amendment concern. The courts, therefore, tend to vigilantly protect against laws which cast a "pall of orthodoxy" over the classroom.¹³³

Students and teachers in the elementary and secondary levels of education are entitled to academic freedom which is vastly circumscribed despite constitutional protection.¹³⁴ These schools function to transmit knowledge considered to be essential rather than to permit academic exploration.¹³⁵ The elementary and secondary schools are closely supervised by the local boards of education which are designed to represent the prevalent view of the community regarding basic values, concepts and skills necessary to integrate the child into an industrialized society.¹³⁶ Neither the state, the community, nor the individual parent can act to "contract the spectrum of available knowledge."¹³⁷ School authorities, however, are entitled to select areas of study which will be included in the curriculum.¹³⁸ Parental involvement in the curriculum selection process does not always promote greater academic freedom. Often the intervention may amount to an attempt to restrict knowledge and limit educational prerogatives.¹³⁹

require that actions of the state and the local boards as arms of state power be reasonable. The local boards cannot act solely in response to community pressure. *See, e.g.,* *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 76-77, 274 A.2d 832, 840 (1971) (majority sentiment of community does not show overriding government interest and necessity); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Ore. 1976) (board must show reasonable fear of material and substantial interference with the education process, not mere fear of voter reaction).

¹³³ *See* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

¹³⁴ *See, e.g.,* *Cary v. Board of Educ. of Adams-Arapahoe School Dist.*, 427 F. Supp. 945, 954-55 (D. Colo. 1977). The right to academic freedom is not so clear on the high school level as on the college level. In *Cary* the district court regarded its role to be limited to deciding who has authority to choose and the extent of the constitutional limitations on the power of the decisionmaker. The wisdom of a school board's decision was supposed to be irrelevant to the district court's determinations. *Id.* at 950.

¹³⁵ *Academic Freedom*, *supra* note 13, at 1050.

¹³⁶ *Cary v. Board of Educ. of Adams-Arapahoe School Dist.*, 427 F. Supp. 945, 952 (D. Colo. 1977); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

¹³⁷ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹³⁸ *See* *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 586 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974). Plaintiffs, a physician and teacher, challenged a state law prohibiting discussion of birth control in public schools. In view of the unquestioned right of the state to establish curricula, as well as the inability of public schools to offer a vast range of subjects, the district court held that it was proper and necessary for education authorities to make certain choices based on their expertise. *Id.*; *see* *Epperson v. Arkansas*, 393 U.S. 97, 110-12 (1968) (Black, J., concurring).

¹³⁹ *See, e.g.,* *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975). In *San Mateo*, the parents' organization sought to enjoin public schools from offering a family life and sex education program. *Id.* at 10-11, 124 Cal. Rptr. at 77. Emphasizing the fact that the program had an excusal system for dissenting parents, the California court rejected all of the plaintiffs' claims of impairments of their religious freedom and parental authority. The court declared that no constitutional right gave the objectors power to preclude other students from voluntarily participating in a course. *Id.* at 32, 124 Cal. Rptr. at 91; *accord*, *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342-44 (D. Md. 1969),

Nevertheless, providing education is a uniquely public function,¹⁴⁰ and the interests of all members of the community must be recognized when school board policies are challenged.¹⁴¹

Parental authority over local policy is limited to the rights granted by the legislature.¹⁴² Consequently, parents do not enjoy a general power to supervise school authorities. Massachusetts recently has established an exception to the curriculum hegemony enjoyed by school authorities by giving legal status to community curriculum petitions. The Massachusetts statute requires that a course shall be taught if a minimum number of parents of enrolled children sign a written request.¹⁴³ By turning authority of the school board over to the parents, however, the statute may preclude other parties with an interest in school affairs from being heard.¹⁴⁴ The choice of curriculum embodies values of the community and state as well as groups whose educational interests are distinct from the parents. The adoption of curriculum and the final decision about the modes and methods of education properly rests with the school board which can integrate the various demands in light of local needs.¹⁴⁵

cert. denied, 400 U.S. 942 (1970); *cf. Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, ___, 274 A.2d 832, 839-41 (1971) (interest of state in sex education program without excusal system must be balanced with interest of the individual). *See generally* K. ALEXANDER & K. JORDAN, *LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT* (1973).

¹⁴⁰ *School Dist. of Abington v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring).

¹⁴¹ *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 631-33 (1969). In an attempt to limit the school district participation "to those primarily interested in education," New York limited the right to vote for members of the school board to persons owning taxable real property or parents with children enrolled in local public schools. N.Y. EDUC. LAW § 2012 (McKinney 19___). The law, the Supreme Court noted, included many persons with a remote or indirect interest in education while excluding many with distinct and direct interests. 395 U.S. at 632. The law, therefore, constituted a violation of the equal protection clause of the fourteenth amendment. However, the Court did not determine whether the state could limit the franchise in school board elections to those who were "primarily interested" or "principally affected." *Id.* at 632. In order to have standing to challenge curriculum regulations the parties must be school children and their parents who are directly affected by the laws and policies. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Neither private citizens nor teachers have standing to raise the rights of students or their parents. *Mercer v. Michigan Bd. of Educ.*, 379 F. Supp. 580, 583-84 (E.D. Mich. 1974).

¹⁴² *See New York City School Boards v. Board of Educ.*, 84 Misc. 2d 237, 241-42, 375 N.Y.S.2d 978, 983 (1975).

¹⁴³ MASS. GEN. LAWS ANN. ch. 71 § 13 (West Cum. Supp. 1978) provides:

In every public high school having not less than one hundred and fifty pupils any course not included in the regular curriculum shall be taught if the parents or guardians of not less than twenty pupils, or of a number of pupils equivalent to five per cent of the enrollment in the high school, whichever is less, request in writing the teaching thereof

¹⁴⁴ GEEL, *supra* note 87, at 144-47; *see Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

¹⁴⁵ *See Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 585 (E.D. Mich. 1974). The curriculum of the state may be established either by law or by delegation of state authority to the local boards and communities. The scope of judicial intervention is limited to ascertaining initially whether the school board has acted within its delegated powers. The

Presently, the parent has the formal opportunity to educate his child as he prefers.¹⁴⁶ Although parents have the choice of selecting a non-public school providing curriculum which they deem proper, the cost of private education is often prohibitive. The Supreme Court's prohibition of aid to parochial schools, and the limited aid available to the parents, creates an effective economic barrier to the exercise of this right.¹⁴⁷ Thus, most parents are forced to accept the values inculcated in the public school system. Despite the questions raised about the compelling nature of state interests in education in *Wisconsin v. Yoder*,¹⁴⁸ as the need for more technical knowledge increases the traditional state interest in adequate education will continue to be protected by the federal and state courts. The recourse left to parents to affect the curriculum remains the cumbersome and often frustrating opportunity to voice opinions at public meetings and the right to elect the members of the school board.

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court then determines whether the action was constitutionally reasonable. *See* *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

¹⁴⁶ *See* text accompanying notes 62-68 *supra*.

¹⁴⁷ *E.g.*, *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁴⁸ *See* text accompanying notes 38-61 *supra*.

