COMPULSORY EDUCATION AND PARENT RIGHTS: A JUDICIAL FRAMEWORK OF ANALYSIS

In recent years violations of state compulsory education laws have risen dramatically.[1] Parents are increasingly choosing types of schooling for their children that are outside those alternatives[2] approved by state statute.[3] These parents find public schools and approved private schools too conservative, too liberal, or simply not academically rigorous enough.[4] Resolving the conflict between parents' interests in controlling the upbringing of their children and a state's interest in enforcing its compulsory education laws is difficult because each interest is significant and is grounded in the United States Constitution.[5] Parents' rights to determine their children's education are grounded in the first amendment, which protects the free exercise of religion, as well as the fourteenth amendment, which protects liberty and the right of privacy.[6] These rights may conflict with the state interest, as accepted by the United States Supreme Court, of ensuring the education of all the children to prepare them to become "self-reliant and self-sufficient citizens."[7] This interest, grounded in the tenth amendment grant of police power, is manifest in compulsory education laws, which require

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[1] Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & Educ. 189, 189 (1983).

[2] For the purposes of this article, "alternatives" refers to schooling that is not approved by the state.

[3] Lines, *supra* note 1, at 191. For example, "[t]he Bureau of the Census estimates that enrollment in non-Catholic, nonpublic schools increased from 615,540 to 1,433,000 between 1965 and 1975. It seems likely that the largest growth is in attendance at unapproved schools. In contrast, public school population has declined from approximately 45,900,000 in 1970 to 42,600,000 in 1978." *Id.*

[4] *Id.* at 190

[5] Although children may have their own constitutional claims, this note will not discuss the claims children themselves may bring. For such a discussion, see L. Tribe, American Constitutional Law 856, 882–83 (1978); *see also* Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting). Further, this note will not discuss claims based on particular state constitutions, but will limit discussion to claims that rely on the Federal Constitution.

[6] *See, e.g.*, *Yoder*, 406 U.S. at 214 (first amendment free exercise clause); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (fourteenth amendment liberty clause). Cases in which alternative schools have brought suits with parents often have included claims grounded in the establishment clause. *See, e.g.*, New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987) (first amendment free exercise and establishment issues were raised). This note focuses primarily on parents' rights and therefore will not discuss the establishment clause directly.

[7] *Yoder*, 406 U.S. at 221.

students to attend schools and which regulate the schools that students attend.[8]

The significance of the interests involved in this conflict makes reconciliation difficult. Courts are currently unsure whether to resolve the conflict by balancing the interests involved, or by applying the recent Supreme Court "strict scrutiny" analysis. Unfortunately, the 1971 decision of *Wisconsin v. Yoder* is the most recent Supreme Court case to touch directly on this conflict; the Court in *Yoder* chose to balance the interests involved.[9] The *Yoder* Court recognized the importance of both the state and parental interests in its decision to exempt Amish children from the last two years of compulsory education required by statute.[10] Amish parents claimed that requiring their children to attend school after the eighth grade infringed upon their religious beliefs and forced them to chose between violating the law or following their religion.[11] The Court balanced the parents' first amendment right to guide their children's religious education with the state interest in ensuring the education of all the children.[12]

Since that decision the Supreme Court has changed its general framework of analysis of the first and fourteenth amendments from a balancing of rights or interests to a strict scrutiny framework.[13] Today, for example, the Court examines state infringements upon religious rights protected by the first amendment under a strict scrutiny framework.[14] Thus, the Court might analogously apply strict scrutiny to compulsory education cases that rest on the first amendment, and abandon the balancing analysis used in *Yoder*.

Compulsory education cases resting on the fourteenth amendment might also be analyzed with a strict scrutiny framework. The Supreme Court now applies strict scrutiny to state infringements on fundamental rights.[15] Although the Supreme Court has not had

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[8] *See generally* Lines, *supra* note 1, at 194.

[9] 406 U.S. at 235.

[10] *Id.* at 213.

[11] *Id.* at 209.

[12] *Id.* at 231–36.

[13] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 448, 457, 1061–63 (2d ed. 1983). Under the strict scrutiny analysis, the Supreme Court gives added protection to certain rights contained in the fourteenth and first amendments. *Id.* Rights which are essential to accepted views of individual liberty justify strict scrutiny. *See id.* at 448, 457.

[14] *See, e.g.*, *Hobbie*, 107 S. Ct. at 1049 (strict scrutiny applies to free exercise clause of the first amendment).

[15] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (strict scrutiny applied to the fundamental privacy right, a mother's right to abort a fetus).

the opportunity to declare parents' rights to guide the education of their children fundamental under its current analysis, early Court decisions found such rights to be essential. Moreover, recently the Court has stated in dicta that the right is fundamental.[16] The Court has also relied on this parental right to help substantiate other rights that it has held fundamental.[17] Thus, parents' right to guide the education of their children may be fundamental. If the Court held the right to be fundamental, and found that state action infringed upon that right, the Court would apply a strict scrutiny analysis.

Under a strict scrutiny analysis, the Court will permit state action which infringes on the first or the fourteenth amendments only if a state's actions are the least restrictive means to achieving a compelling state interest. Thus, if educating children is a compelling state interest, the state may regulate education despite infringing on parents' rights if the regulations are proven to be essential. Although the Supreme Court has not had the opportunity to find the state interest in education compelling, it has made clear that this interest is crucial to society. Therefore, the state interest in education is probably compelling.[18]

Because the Supreme Court has not yet applied strict scrutiny to compulsory education cases, courts are now unsure whether to analyze education conflicts within the new "strict scrutiny" framework or to follow the balancing framework used in *Yoder*.[19] The result has been a patchwork of different analyses, as evidenced in the recent Massachusetts cases, *Care and Protection of Charles*[20] and *New Life Baptist Church v. East Longmeadow*.[21] In *Charles*, the Massa-

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[16] *Roe*, 410 U.S. at 153.

[17] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 505–06 (1977). The Court held that a housing ordinance violated the liberty protected by the due process clause of the fourteenth amendment. *Id.* In particular, the Court held that the ordinance violated the appellant's right to live with her extended family. *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (the Court recognized a fundamental right to privacy among married couples in regard to their use of contraception).

[18] *See generally id.* For the purposes of discussion of strict scrutiny, and because of the importance with which the Court holds the state interest, this note will assume that the interest would be held compelling.

[19] This confusion is manifested by different courts applying different frameworks of analysis. *See, e.g.*, Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987) (court confronted with first and fourteenth amendment claims primarily applied a balancing test); New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987) (court applied strict scrutiny to first amendment claims); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (court applied strict scrutiny to first and fourteenth amendment claims).

[20] 399 Mass. 324, 504 N.E.2d 592 (1987).

[21] 666 F. Supp. 293 (D. Mass. 1987).

chusetts Supreme Judicial Court was confronted with both fourteenth and first amendment claims and applied the balancing framework employed in *Yoder*.[22] The court upheld a school committee's decision to forbid home schooling to a particular family, ruling that the compulsory education statute was constitutional as applied.[23] In contrast, the Massachusetts federal district court in *New Life* applied the strict scrutiny framework to a first amendment free exercise claim and enjoined a school committee from applying its particular approval process to an unapproved private religious school.[24] Although the parents' claims were similar, both courts analyzed the Massachusetts statute with different general frameworks and reached different results.

If a court applies strict scrutiny analysis, it must define exactly what the state's interest in education involves, and whether the state's regulatory scheme is the least restrictive means of achieving this interest; unfortunately, this is no easy chore. The Supreme Court has accepted the view that the state has an interest in ensuring the education of all children.[25] According to the Court, the purpose behind education is to prepare citizens to "participate effectively and intelligently in our open political system" and to prepare "individuals to be self-reliant and self-sufficient participants in society."[26] Although the degree of education that will satisfy this purpose is unclear, the Court did accept Thomas Jefferson's notion that the state interest would be satisfied by a "basic" education. Thus, the Court has held that basic education entails the "three R's," but has gone into no further detail.[27]

Litigants representing states have argued that this state interest in education ought to be expanded from the notion of "basic" education to something more substantial due to the sophisticated demands of the modern job market.[28] Further, proponents of a broader state interest have argued that children must be provided the necessary reasoning skills to be able to question their religious faith.[29] The Supreme Court, to date, has not extended the state interest beyond ensuring that children receive a basic education.[30]

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[22] 399 Mass. at 336, 504 N.E.2d at 599.

[23] *Id.* at 337, 504 N.E.2d at 600.

[24] 666 F. Supp. at 319–20. The parents and school also raised establishment clause issues. *Id.* at 322–25. This note will not discuss these issues.

[25] *Yoder*, 406 U.S. at 221.

[26] *Id.*

[27] *Id.* at 226, 226 n.14.

[28] *See, e.g., New Life*, 666 F. Supp. at 318; *Yoder*, 406 U.S. at 221, 232.

[29] *See, e.g., New Life*, 666 F. Supp. at 318; *Yoder*, 406 U.S. at 221, 232.

[30] *See Yoder*, 406 U.S. at 221, 232–33.

The lack of specificity as to what constitutes a "basic" education coupled with the effects of a complex, growing society ensure that claims brought to define and extend this interest will continue.

This note discusses the framework of analysis courts have applied to the conflict between parents' rights to guide the educational upbringing of their children and the state's interest in compulsory education, suggesting that because parents' rights are within the first amendment and ought to be within the fourteenth amendment, strict scrutiny analysis is the correct framework to apply. Section I analyzes the basis and history of the state interest in education, noting how states, Massachusetts in particular, have enacted laws to further this interest.[31] Section II focuses on the reasons for parental dissatisfaction with state approved education. This section discusses the constitutional rationales and analytical frameworks the Supreme Court has accepted and might accept for recognizing parents' rights to guide the education of their children.[32] Section III examines two recent Massachusetts cases in which the courts applied different frameworks to resolve compulsory education conflicts.[33] This section analyzes the problems that result when courts apply different frameworks to this conflict.[34]

This note suggests that parents' rights to guide the education of their children are fundamental rights protected by both the first and fourteenth amendments to the Constitution. Thus, courts should apply to all compulsory educational conflicts, whether the first or fourteenth amendment is implicated, the strict scrutiny framework that the Supreme Court has applied to fundamental rights. This framework of analysis properly recognizes the importance of the parents' fundamental rights as well as states' compelling interest. Furthermore, this note suggests that the state interest in education is correctly limited to ensuring that all children are educated in the basics. Only after the state has been able to ensure that such an interest is met ought courts even to consider enlarging such a basic interest.

I. State Interest in Compulsory Education

The Supreme Court has accepted the notion that state governments have an interest in providing a "basic" education for all

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[31] *See infra* notes 35–105 and accompanying text.
[32] *See infra* notes 106–217 and accompanying text.
[33] *See infra* notes 218–259 and accompanying text.
[34] *Id.*

children.[35] The Court has never explicated what is required to provide such a basic education other than reading, writing, and arithmetic.[36] Recently, litigants have urged a broadening of the state interest to include more than "basic" education.[37] They have argued that as times have changed, the ability to be independent and to function successfully in society requires more than the basics.[38] To analyze these differing views of the state's interest in education, one needs to understand the roots and modern definition of this interest.

A. *The History of Compulsory Education Laws*

The history of compulsory education laws manifests the varied motives of such laws' proponents.[39] Many historians believe that compulsory education laws grew out of the English "Poor Laws" of 1563 and 1601.[40] These laws provided for a nation wide system of apprenticeship by requiring the poor or unemployed to participate in a seven year compulsory service.[41] Such laws established the state's involvement in family life, children, and education, an involvement that would shape American educational legislation for the next 300 years.[42] This view of the origin of compulsory education rests primarily on the belief that such laws were aimed at helping individuals become economically independent and at instilling moral values.[43] Lawmakers attempted to address the economic and social problems plaguing the lower classes; these laws did not apply to the upper or middle classes.[44]

A more cynical view is that compulsory education grew out of lawmakers' desire to indoctrinate and inculcate obedience.[45] Pro-

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[35] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[36] *Id.* at 221, 226 n.14.

[37] *See, e.g.*, New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293, 305, 307 (D. Mass. 1987).

[38] *Id.* at 318 n.15.

[39] What follows in the text are two of the primary theories that explicate the state interest in education. For other views, see generally D. KIRP & M. YUDOF, EDUCATION POLICY AND THE LAW 1–8 (1984).

[40] L. KOTIN & W. AIKMAN, LEGAL FOUNDATION OF COMPULSORY SCHOOL ATTENDANCE 9 (1980) [hereinafter KOTIN].

[41] *Id.* at 9.

[42] *Id.* at 10.

[43] *Id.*

[44] *Id.* at 11.

[45] ROTHBARD, *Historical Origins*, in THE TWELVE-YEAR SENTENCE 11–12 (W. Rickenbacker ed. 1974).

ponents of this view regard the Protestant Reformation as the foundation of compulsory education. Martin Luther's influence helped create compulsory attendance laws as early as 1524 in the German state of Gotha. John Calvin, another influential voice in education, felt the major object of education was to suppress dissent and inculcate obedience. Thus, it is not surprising that Calvinist Puritans were the first to establish compulsory education and public schools in America.[46] It may well have been both a desire for individuals to participate successfully in society and a need to inculcate obedience and societal values which led this country to adopt compulsory education laws.[47]

The leading Puritan colony of Massachusetts Bay enacted the first American compulsory education law in 1642.[48] Unlike the "Poor Laws" in England, this law required all parents and masters to provide an education in a trade and in reading to all children, not merely the poor ones, and contained an elaborate system of penalties.[49] This act became the model for all subsequent educational legislation in New England.[50]

The first legislation providing for the creation of public schools and teachers was also in Massachusetts and was known as "The Old Deluder Satan Act."[51] This legislation provided taxes from the general populace to set up schools and pay teachers.[52] The southern colonies, however, did not follow Massachusetts' lead and instead adopted laws for the poor that resembled the apprenticeship model of the English "Poor Laws."[53]

Interest in compulsory education waned at the closing of the 17th century. This lack of interest continued until after the American Revolution. Frontier conditions, the need for child labor, and the decline of religious fervor all contributed to this decline.[54]

After the decline, however, Massachusetts again emerged at the forefront of public education.[55] In 1789 Massachusetts enacted the

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[46] *Id.* at 11–13.

[47] The Supreme Court has accepted both views. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[48] KOTIN, *supra* note 40, at 11 (citing Records of the Governor and Company of Massachusetts Bay in New England 6–7 (June 14, 1642)).

[49] *Id.*

[50] *Id.* at 14.

[51] *Id.* at 17–18. The Act was named because of a fear of Satan, who allegedly used ignorance to keep people from knowledge of the Bible. *Id.* at 18.

[52] *Id.*

[53] *Id.* at 20.

[54] *Id.* at 20–23.

[55] *Id.* at 24.

first state-wide school law that established guidelines for the creation of schools and established a school district system.[56] The Massachusetts School Attendance Act of 1852 represented the first general compulsory attendance law established in America.[57] The statute required adults responsible for children between the ages of eight and fourteen to send such children to school for twelve weeks annually, six weeks of which had to be consecutive.[58] By 1900, perhaps reacting to the tremendous influx of immigrants, over thirty states enacted similar statutes, which required school attendance for a specified period of time per year for all children within specified age groups.[59] Southern states followed this trend during the years 1900 to 1918, though not until 1983 did all fifty states and the District of Columbia have such laws.[60]

Numerous factors account for the importance of compulsory education in America.[61] The influx of immigrants at various times in our history may have increased states' desire to have a system to aid in assimilating and introducing American values.[62] Also, the desire to give all children the chance to participate successfully in society, both socially and economically, played a part in the move to compel children to go to school.[63]

The Supreme Court has held that the state interest in effectuating either or both of these goals is of "supreme importance," and states should diligently promote them.[64] As society became increasingly complex, the Court recognized that the state interest in education became more important.[65] In 1954 the Supreme Court acknowledged the importance of the state interest, stating that pro-

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[56] *Id.* The statute required towns of fifty families to support an "English School" at least six months a year, towns of 100 families to operate such a school all year long, and towns of 150 families to support a year round school and a grammar school that met for six months. *Id.*

[57] MASS. GEN. L. ch. 24, §§ 1, 2, 4 (1852).

[58] *Id.*

[59] KOTIN, *supra* note 40, at 25–26.

[60] *Id.* at 26. Mississippi was the last state to require attendance. The state repealed attendance laws following forced desegregation in the 1950s. *See* Lines, *supra* note 1, at 197.

[61] *See* KIRP & YUDOF, *supra* note 39.

[62] ROTHBARD, *supra* note 45, at 27–28.

[63] KOTIN, *supra* note 40, at 26.

[64] *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (Court noted importance of the state interest while holding unconstitutional a state law that forbade the teaching, in any private or public school, of any modern language other than English to any child who had not passed the eighth grade).

[65] *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (the Court recognized the importance of education to all children in its decision that laws requiring or permitting segregation of public schools were unconstitutional under the fourteenth amendment).

viding education was "perhaps the most important function of state and local governments."[66] The Supreme Court combined the divergent views described above, and defined the goals of compulsory education in terms of inculcating obedience and values, and providing children with a chance to succeed socially and economically in society. Thus, a desire both to inculcate obedience and to foster the social and economic development of the poor were instrumental in the creation of compulsory education laws.

B. *Current Compulsory Education Laws*

All states, and the District of Columbia, have enacted statutes that require children within certain ages to attend some form of approved educational program.[67] These statutes usually provide punitive action against the children and the parents of children who do not attend an approved educational alternative, but not against those who run unapproved private schools.[68] Although it is hard to generalize about all these statutes, they do contain some common threads.

All state statutes allow parents to send their children to private schools.[69] In addition, all state statutes provide an exception to mandatory school attendance for some form of home schooling.[70] Some statutes allow local school committees, school boards, or superintendents to have the power to approve home instruction or private school.[71] Other state statutes leave such authority to state-level boards of education or state superintendents.[72] For example, in Nevada, the state board of education is responsible for approving private schools and home schooling,[73] whereas in West Virginia the

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[66] *Id.* at 493.

[67] Lines, *supra* note 1, at 194.

[68] *Id.* Lines notes that "[t]he law almost always provides for fines and jail sentences for parents who fail to comply, and often truancy charges and possible institutionalization of the child." *Id.*

[69] *See generally id.* at 194–95.

[70] Lines, *An Overview of Home Instruction*, 68 PHI DELTA KAPPAN 514 (March 1987) [hereinafter Lines, *Overview*]. Lines stated that "[b]y the end of 1986 . . . every state permitted home instruction in some form." There is a trend toward liberalization, evidenced by the fact that in 1983 only about half the states permitted instruction at home by the parent. Lines, *supra* note 1, at 197. Moreover, states that permit home instruction have consistently moved in the direction of relaxing regulations. Lines, *Overview*, *supra*, at 514.

[71] *See generally* Lines, *supra* note 1, at 194–95.

[72] *See generally id.*

[73] NEV. REV. STAT. § 392.070 (1986).

county board of education is responsible for making preliminary decisions for both private and home schooling.[74]

Despite these similarities, statutory requirements vary widely among states.[75] Some states have few statutory requirements.[76] For example, New Jersey provides a broad exception to the compulsory education requirement.[77] Parents in New Jersey must send their children to public school or a private school that affords them instruction equivalent to that provided in the public schools or "equivalent instruction elsewhere than at school."[78]

At the other end of the spectrum are such states as North Dakota and West Virginia, which have several statutory requirements.[79] In North Dakota a private school must be approved by the county superintendent, who must insure that children attend for "the same length of time" as in public school, that the teachers are legally certified, that the subjects offered meet state requirements, and that the school complies with all health, fire, and safety laws.[80] The West Virginia statute also contains extensive requirements. To be approved in West Virginia, a private school must teach for a specified length of time per year, teach specified subjects, keep records of progress and attendance, supply a curriculum, have students take regular standardized tests, and require teachers either to achieve a score on the National Teachers Examination sufficient for teacher certification or to have a high school diploma and at least four years more formal education than the most academically advanced child taught.[81] Thus, there are marked differences in the stringency of statutes.

The Supreme Court accepted the states' general power to enforce compulsory attendance laws as early as the 1920s.[82] The Court recognized that states' authority to enact and enforce compulsory education statutes derives primarily from the tenth amendment to

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[74] W. VA. CODE § 18-8-1 (Supp. 1987).

[75] Lines, *supra* note 1, at 194.

[76] *Id.* at 195; *see, e.g.*, HAW. REV. STAT. § 298-8,9 (1985) (specified age, amount of days of study); IND. CODE § 20-8.1-3-17 (Supp. 1987) (specified age, amount of days of study, and taught in the English language); N.J. STAT. ANN. § 18A:38-25 (1968) (specified age, equivalent instruction).

[77] N.J. STAT. ANN. § 18A:38-25 (West 1968).

[78] *Id.*

[79] N.D. CENT. CODE § 15-34.1-01, 15-34.1-03 (Supp. 1987); W. VA. CODE § 18-8-1 (Supp. 1987).

[80] N.D. CENT. CODE § 15-34.1-01, 15-34.1-03 (Supp. 1987).

[81] W. VA. CODE § 18-8-1 (Supp. 1987).

[82] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

the Constitution.[83] The Supreme Court has held that the amendment protects the states' authority to regulate their citizens' health and safety.[84] The Court has maintained that compelling children to attend school falls within these bounds.[85] Thus, states possess a general constitutional right to enact such statutes.[86]

Although the Court has found the general right to enact compulsory education statutes to be constitutional, a particular statute may use language so broad that it may be unconstitutionally vague.[87] For example, statutory language used in many states calls for alternative education to be "equivalent" to public school education.[88] The use of the broad notion of "equivalency" may leave too much discretion to the state, making the statute too broad and unconstitutional on its face.[89] Although the Supreme Court has not had before it a compulsory education case in which it determined that the statute was too vague, numerous state courts have confronted this issue.[90]

Currently, eighteen states have statutes that call for instruction in alternative schools to be equivalent, comparable, or similar to the instruction offered in public school.[91] Many of these statutes have

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[83] *Id.* The pertinent part of the tenth amendment reads "the powers not delegated to the United States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Supreme Court stated that "[t]he power of the State to compel attendance at some school and to make reasonable regulation for all schools, . . . is not questioned." *Meyer*, 262 U.S. at 402.

[84] *See, e.g., Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873). In upholding a state statute, the Court recognized that states possess a "police power." *Id.* at 63. The Court stated that, although "incapable of any very exact definition or limitation, . . . upon it depends the security of social order, the life and health of the citizen . . . ." *Id.* at 62.

[85] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); *Meyer*, 262 U.S. at 402.

[86] *See Meyer*, 262 U.S. at 402.

[87] Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (Court found anti-noise statute neither vague nor overbroad).

[88] *See infra* note 91.

[89] *See, e.g.*, Ellis v. O'Hara, 612 F. Supp. 379, 380–81 (E.D. Mo. 1985) (court found that the statutory language "substantially equivalent" was void for vagueness); Roemhild v. State, 251 Ga. 569, 571, 308 S.E.2d 154, 157 (1983) (court found Georgia statute was not sufficiently definite in noting that a home school could not constitute a private school); State v. Popanz, 112 Wis. 2d 166, 171–73, 332 N.W.2d 750, 753–54 (1983) (court held the term "private school" used in the Wisconsin statute was unconstitutionally vague because it left the school attendance officer to define the term).

[90] *See supra* note 89; *see also infra* note 92.

[91] ALASKA STAT. § 14.30.010 (1987) ("is provided an academic education comparable to that offered by the public schools in the area"); CONN. GEN. STAT. § 10-184 (1986) ("is elsewhere receiving equivalent instruction in studies taught in the public schools"); D.C. CODE ANN. § 31-401 (1982) ("instruction given . . . is deemed equivalent by the Board of Education to the instruction given in the public school"); IOWA CODE § 299.1 (Supp. 1987) ("may attend upon equivalent instruction by a certified teacher elsewhere"); ME. REV. STAT. ANN. tit. 20-

faced constitutional challenges on the basis that such language is too vague or overbroad.[92] The Supreme Court holds that a statute is too vague if people of ordinary intelligence must guess at its meaning and would differ as to its application.[93] Such statutes are unconstitutional because they do not allow an individual to determine what is lawful and what is not.[94] A citizen thus will not have fair warning and may unknowingly be trapped into breaking the law. In addition, overbroad statutes and vague statutes will give too much discretion to officials charged with enforcing the law.[95] Finally, a vague or overbroad law may scare citizens and thereby inhibit or chill their exercise of protected civil rights.[96] States are divided as

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A, § 5001-A(3) (Supp. 1987) ("obtains equivalent instruction in a private school or in any other manner arranged for by the school board . . . and approved by the commissioner"); MD. EDUC. CODE ANN. § 7-301 (Supp. 1987) ("is otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools"); MASS. GEN. L. ch. 76 § 1 (1982) ("or being otherwise instructed in a manner approved by the superintendent or the school committee . . . that the instruction in all studies . . . equals in thoroughness and efficiency, and in the progress made therein, . . . that in the public schools"); MICH. COMP. LAWS § 15.41561 (1987) ("state approved nonpublic school . . . teaches subjects comparable to those taught in the public schools to children of corresponding age and grade"); NEV. REV. STAT. § 392.070 (1986) ("the child is receiving at home or in some other school equivalent instruction of the kind and amount approved by the state board of education."); N.J. REV. STAT. § 18A:38-25 (1985) ("a . . . school in which there is given instruction equivalent to that provided in the public schools"); N.C. GEN. STAT. § 115C-378 (Supp. 1985) ("and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education . . . and maintain such minimum . . . standards as are required of public schools"); R.I. GEN. LAWS § 16-19-2 (1981) ("the school committee shall approve a private school or private instruction . . . when . . . the period of attendance . . . is substantially equal to that required by law in public schools;. . . . [subjects are] taught in the English language substantially to the same extent as such subjects are required to be taught in the public schools"); VT. STAT. ANN. tit. 16, § 1121 (1958 & Supp. 1987) ("is being furnished with equivalent education"); WIS. STAT. § 118.15(4) (1973) ("approved by state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools").

[92] *See, e.g.*, Ellis v. O'Hara, 612 F. Supp. 379, 380–81 (E.D. Mo. 1985) (court found that the statutory langauge "substantially equivalent" was void for vagueness); Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (D. Iowa, 1985) (court held statutory language "equivalent instruction" unconstitutionally vague); Bangor Baptist Church v. Maine, 549 F. Supp. 1208, 1226–27 (D. Me. 1982) (court held that statutory language "equivalent instruction" was not unconstitutionally vague, trusting the state authorities to construe the term narrowly); State v. Labarge, 134 Vt. 276, 279–80, 357 A.2d 121, 124–25 (1976) (court held statutory language of "equivalence" was not unconstitutionally vague, trusting state officials to interpret).

[93] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[94] *Id.*

[95] *Id.* at 108–09, 114.

[96] *Id.* at 109.

to whether the language, "substantially equivalent" or "equivalent," is unconstitutionally vague or overbroad.[97]

Although a statute may be constitutional on its face, it may be applied in an unconstitutional fashion.[98] Unconstitutional applications may occur because the statutes often leave room for local or state authority to approve of alternative educational programs.[99] These authorities may create their own rules within statutory boundaries.[100] Thus, state officials may interpret a lenient statute so that it includes stringent requirements. For example, the Massachusetts statute gives much discretion to local school committees and superintendents.[101] The State Board of Education sets the age limits and days that students are required to be in school.[102] Local school committees approve private schooling and home schooling. The school committee will approve both types of schooling if it finds that the education offered and actually learned is equivalent to that in the public schools in the same town.[103] Thus, the statute permits local school committees or superintendents to make many of the important educational decisions and, therefore, is most likely to be attacked on the basis of a particular school committee's interpreta-

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[97] *See supra* note 92. It is interesting to note that, although neither Maine nor Vermont found the language "equivalent" to be unconstitutionally vague, each state has defined it differently. Lines, *supra* note 1, at 211.

[98] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). The Court noted that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.* at 220.

[99] *See, e.g.*, HAW. REV. STAT. § 298-8, 9 (1985) (specified age, amount of days of study); IND. CODE § 20-8.1-3-17 (Supp. 1987) (specified age, amount of days of study, and taught in the English language); N.J. STAT. ANN. § 18A:38-25 (1968) (specified age, equivalent instruction).

[100] *See infra* text accompanying notes 219–48. Local and state authorities are acting on behalf of the state. Therefore, it is of little consequence to parents or courts, in determining if rights have been infringed upon, whether requirements were created by state statute or these authorities.

[101] MASS. GEN. L. ch. 76, § 1 (1982 & Supp. 1988).

[102] *Id.* "Every child between the minimum and maximum ages established for school attendance by the board of education" shall attend school. *Id.* Children shall attend "during the number of days required by the board of education in each school year." *Id.*

[103] *Id.* The statute provides that "the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town." *Id.* Specifications for private school approval are meant to include home schooling as well. Care and Protection of Charles, 399 Mass. 324, 331, 504 N.E.2d 592, 597 (1987). Massachusetts courts have held that the "equivalency" language is not unconstitutionally vague. *See, e.g.*, New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293, 310 (D. Mass. 1987); Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1984).

tion rather than on its face.[104] Because statutes can be interpreted in a variety of ways, a statute may be constitutional on its face, but be applied in an unconstitutional fashion.[105]

In sum, the Supreme Court has recognized a wide variety of important state interests in education. In particular, the Court has noted the value of preparing citizens to participate effectively in society and inculcating obedience. The Court has also found that states possess the general power to enforce compulsory education laws that are confined within the state interest of providing a basic education. The Court has applied a balancing framework to the decisions it has made in this area, and thus has not had the opportunity to decide if the state interest is compelling under a strict scrutiny framework. The Court has, however, made it clear that the state interest in education is crucial to maintaining our society and that instituting this interest is perhaps the state's most important function.

II. Parent Interests and the Supreme Court

Although the state interest in education is substantial, courts have also recognized parents' interest in guiding the education of their children as both important and rooted in legitimate constitutional arguments. Courts have held this parental interest to be primarily grounded in either the first or fourteenth amendments. This section discusses why parents have been dissatisfied with the education permitted under state statutes, upon what constitutional bases a parent's right might rest, and which constitutional rationales the Supreme Court has accepted and might accept.

Parents' dissatisfaction with how states have chosen to manifest their recognized interest in education is evidenced by the increased number of families choosing educational alternatives outside those approved by state statute.[106] Those parents choosing unauthorized,[107] alternative types of schooling for their children tend to do so for a myriad of reasons encompassing a full range of political

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[104] Although litigants will tend to attack a statute both on its face and as applied, because the courts have already determined the statute is constitutional, the focus of decisions has been on its application. *See, e.g., Charles*, 399 Mass. at 324–33; *New Life*, 666 F. Supp. at 310.

[105] *See supra* note 98; *see also* State v. Labarge, 134 Vt. 276, 279–81, 357 A.2d 121, 124–25 (1976) (state board of education judged to have gone beyond statutory authority).

[106] Lines, *supra* note 1, at 191.

[107] Unauthorized alternatives are those school alternatives not approved by the state.

and religious ideals and values.[108] For example, the recent growth in fundamentalist Christian organizations has been accompanied by an increase in parents who are unhappy with the secular nature of public schools and who have not found suitable private religious schools. Other parents feel that their children can receive a better education with less structure and more attention through home schooling.[109] Both liberal and conservative parents may object to political and cultural values that they believe public or approved private schools disseminate.[110] Consequently, conflict between parents' interests in determining their children's education and the state interest in ensuring adequate education has become inevitable and is likely to continue.[111]

Courts have held parents' interest in the upbringing of their children to be rooted in the fourteenth and first amendments to the Constitution.[112] Parents who rely primarily on the fourteenth amendment may argue that their right to guide the education of their children is implicit in the liberty protected in the due process clause or is contained within the rubric of the right of privacy.[113] Parents whose schooling decision is primarily a religious choice may rely on the protections of the first amendment free exercise clause as applied to the states through the fourteenth amendment.[114] Parental claims under these amendments met with differing degrees of success as courts analyzed the claims with different frameworks.[115]

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[108] Lines, *supra* note 1, at 190.

[109] *Id.*

[110] Lines, *An Overview*, *supra* note 70.

[111] *Id.*

[112] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 230–31 (1972) (Court held that the parents' right to guide and direct the education of their children was primarily grounded in the first amendment free exercise clause); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (Court held that the fourteenth amendment liberty protection encompassed the liberty of parents and guardians to direct the upbringing and education of children under their control).

[113] *See infra* notes 116–172.

[114] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Court held that the first amendment free exercise clause applied to state action through the fourteenth amendment).

[115] New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987) (court applied strict scrutiny); Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 292 (1987) (court primarily balanced the interest involved, holding that the state may make reasonable regulations); Attorney General v. Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982) (court applied strict scrutiny); State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981) (court applied a balancing analysis, holding that reasonable government regulations are permissible).

A. *Parents' Rights Under the Fourteenth Amendment*

The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law."[116] Parents have argued that raising and educating their children as they determine falls within generally accepted notions of liberty protected by the fourteenth amendment due process clause.[117] The Supreme Court accepted this view of the fourteenth amendment in the 1920s with a trilogy of cases dealing directly with compulsory education.[118] At the time these cases arose, the Court had been utilizing the notion of substantive due process, primarily in regard to economic rights.[119] The Supreme Court protected the economic rights of the schools in these cases, but extended the use of due process to parents' right to guide the education of their children.[120] The Court, faced with having to reconcile the state's interest and parents' rights, chose to apply a balancing framework.[121]

In *Pierce v. Society of Sisters*, the Court held that an Oregon statute that compelled public school attendance and prohibited any other form of education was unconstitutional.[122] The state enforced the statute against the Society of Sisters, a Catholic institution that cared for and educated children, and Hill Military Academy, which provided education and military training for children. The Court recognized the interests of both the parents and the state in holding

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[116] U.S. CONST. amend. XIV.

[117] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[118] Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[119] BREST & LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION MAKING 210–15 (2d ed. 1985). The "Lochner" period was one in which the Court used the notion of substantive due process primarily in the area of economics. *Id.* It was during this period that the Court recognized parents' rights to guide the education of their children. *Id.* at 658–61. Although the Court abandoned the economic due process analysis that marked the era, "it never purported to abandon the substantive due process protection of noneconomic rights" such as those noted in *Pierce*, 268 U.S. 510 (1925), and *Meyer*, 262 U.S. 390 (1923). *Id.* at 660; *see also* Hennessey, *Explosion in Family Law Litigation*, 14 FAM. L. Q. 187, 191–92 (1980) (noted Court's repudiation of substantive due process to protect economic rights and continued reaffirmance of substantive due process to protect family related rights); NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW 436–61 (2d ed. 1983) (text describes downfall of use of substantive due process in economic areas and outlines its emergence in the right of privacy, among other areas).

[120] *See infra* text accompanying notes 122–139.

[121] *Id.*

[122] 268 U.S. at 530–31. In *Pierce* the Court also addressed the property right of private schools to remain in business under the fourteenth amendment's due process clause. *Id.* Because substantive due process fell into disfavor, this issue will not be discussed. *Id.*

that the statute went too far in impinging on the parents' fourteenth amendment liberty right to guide the upbringing of their children.[123] The Court determined that the state had a legitimate interest in and authority to reasonably regulate all schools. The Court held that it is "reasonable" for the judiciary to allow a state to "inspect, supervise and examine" schools, and also to allow a state to require that all children at set age limits attend, that teachers be moral and patriotic, and that studies advocate good citizenship and do not conflict with public policy.[124]

The Court, however, ruled that the legislation went too far in interfering with the parents' fourteenth amendment liberty right to guide their children's education.[125] The Court, in acknowledging the rights of parents, noted that "the child is not the mere creature of the State;" parents have the right and the duty to nurture and direct their children's destiny.[126] The Court went further in describing the importance of the parents' rights, noting that such rights are fundamental to our system of government and common notions of liberty.[127]

Thus the Court in *Pierce* legitimized both the state's and parents' interests, and grounded the parents' interest in the fourteenth amendment.[128] The Court resolved the conflict between interests by holding that a state may regulate a child's schooling so long as it does so in a reasonable fashion — that is, the enacted law must bear a reasonable relation to the state's legitimate interest in education. The Court balanced the two important interests involved in order to find the "reasonable" middle ground.[129]

The other two cases resolved in the 1920s also recognized parents' liberty right within the due process clause, though they dealt not with the prohibition of alternative schools, but with the regulation of alternative schools and subject matter.[130] In *Meyer v. Nebraska*, the Court held "unreasonable" and thus unconstitutional

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[123] *Id.* at 531–33.

[124] *Id.* at 534.

[125] *Id.* at 534–35.

[126] *Id.* at 535.

[127] *Id.* The Court stated that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children." *Id.*

[128] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

[129] *Id.* at 534–35.

[130] Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (statute prohibiting teaching of foreign languages); Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927) (statute dictating strict requirements for private schools).

a Nebraska statute that prohibited the teaching of foreign languages to any child who had not passed the eighth grade.[131] The Court again relied on the fourteenth amendment liberty clause to hold that the statute violated the parents' right to choose appropriate education for their children.[132] The Court noted that the liberty protected by the due process clause of the fourteenth amendment includes the right "to acquire useful knowledge, to marry, establish a home and bring up children."[133] The state argued that it had an interest in promoting good citizenship and imparting American values through education.[134] The Court did not deny that the state had such an interest, and did not question "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools."[135] This state interest, the Court added, includes prescribing a curriculum. The Court, however, ruled that the statute unreasonably impinged on the basic right of parents to determine the subjects taught at the school of their choosing.[136]

In the third of the trilogy of cases, *Farrington v. Tokushige*, the Court again applied a balancing process similar to that applied in *Meyer*.[137] In *Farrington*, the Court struck down a Hawaiian statute which, in effect, dictated all the characteristics of the private schools. The Court found that the statute would "probably destroy most, if not all" of the affected schools.[138] Again, the Court acknowledged both interests, but held that the state had gone too far in impinging on the parent's liberty right to control their children's education.[139]

Pierce, *Meyer*, and *Farrington* represent the Supreme Court's first attempts to reconcile parents' rights to control their children's education and upbringing and the state's interest in compulsory education. In each case the Court recognized that parents' rights to guide the education of their children are grounded in the liberty

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[131] 262 U.S. 390, 403 (1923).

[132] *Id.* The Court also held that the right of foreign language teachers to have access to gainful employment was protected by the fourteenth amendment. *Id.*; *see also supra* notes 119, 122.

[133] *Meyer*, 262 U.S. at 399.

[134] *Id.* at 398.

[135] *Id.* at 402.

[136] *Id.* at 402, 403.

[137] *See* Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927).

[138] *Id.* at 298–99.

[139] *Farrington*, 273 U.S. at 298–99. Because Hawaii was not a state, the Court applied the due process clause of the fifth amendment to protect these important parental rights. *Id.* at 299. The due process of the fifth amendment affords the same protection as the due process of the fourteenth amendment. *Id.*

protected by the fourteenth amendment. The Court used a balancing framework, weighing the state infringements of parents' rights in an attempt to define the "reasonableness" standard it established. Under the reasonableness standard, the state's regulations concerning education must be reasonably related to the state's educational goals and must not unreasonably infringe parents' rights. Although the Supreme Court was not specific, it made clear that some alternatives to public school are reasonable.[140] In addition, the Court indicated a state may make reasonable regulations concerning the curriculum and teacher qualifications in non-public schools, and may inspect and examine such schools to make sure they comply.[141] Although the Court did not set forth an exact definition of "reasonable," it held that the three statutes in question exceeded reasonableness on their face.[142]

The Court utilized the notion of substantive due process at the time these cases arose.[143] In the years following these cases the use of substantive due process fell into general disfavor with the Court until the doctrine's reemergence through the general right of privacy and other fundamental rights.[144] Despite the trend away from the use of substantive due process, the Court continued to hold that parents' right to guide the education of their children is important to the very fabric of our society.[145]

Wisconsin v. Yoder marks the most significant and last attempt the Supreme Court has made to reconcile the state and parental interests in compulsory education.[146] The Court in *Yoder* exempted Amish children from the state compulsory attendance law, applying both the first and fourteenth amendments.[147] Amish parents objected to sending their children to school beyond the eighth grade, arguing that their religious principles compelled them to keep their children at home where they could teach them practical skills such

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[140] *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (Court allowed for schools other than public school).

[141] Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (Court allowed the state to compel attendance and "to make reasonable regulations"). *See generally* Farrington v. Tokushige, 273 U.S. 284 (1927) (Court allowed basic curriculum).

[142] *See supra* notes 122–139 and accompanying text. Today plaintiffs challenge statutes on their face primarily with claims that the statutes are vague or overbroad. *See, e.g., infra* text accompanying notes 222–31.

[143] *See supra* note 119.

[144] *Id.*

[145] *Id.*

[146] 406 U.S. 205 (1972).

[147] *Id.*

as farming.[148] The state law, however, required that each child stay in school until the age of sixteen.[149]

The Court focused primarily on the first amendment. It distinguished between claims based solely on the fourteenth amendment liberty clause and those based on religious beliefs, stating that a claim based solely on personal preference or secular belief would not demand the same weight as a claim based on religious beliefs.[150] The Court noted that it was important that the claim being brought was not the result of some recent or progressive method of childrearing.[151] The Court argued that religious beliefs added much weight to the parent's claim, a position which may have been held over from the Court's reluctance to use substantive due process.[152] The Court implied that a religious underpinning may be crucial to parents' claims.[153]

Despite deemphasizing the parents' fourteenth amendment claims, the Court cited *Pierce* and *Meyer* to support its finding that it is beyond debate and a firmly established tradition in this country that parents are primarily responsible for the raising of their children.[154] Although such a statement would support a fourteenth amendment view, the Court chose to interpret *Pierce* as a case that stood "as a charter of the rights of parents to direct the religious upbringing of their children."[155] This interpretation is particularly troubling in that the *Pierce* opinion did not even mention the first amendment.[156]

The Supreme Court has not had another chance to decide a similar case since its decision in *Yoder*. Thus, the Court has not had the opportunity to decide if the parental right to guide the education of one's children, as protected by the liberty of the due process clause, is a fundamental right under the modern strict scrutiny

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[148] *Id.* at 235–36.

[149] *Id.* at 207.

[150] *Id.* at 216. The Court stated that "[i]t can not be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.*

[151] *Id.* at 235.

[152] *Id.* at 216, 235.

[153] *Id.*

[154] *Id.* at 232.

[155] *Id.* at 233.

[156] *See Pierce*, 268 U.S. 510. Although one of the two claimants did represent a religious school, the Court never addressed the first amendment. *Id.*

analysis. The language in the cases indicates that the Court considers the right important to the fabric of our society. Since *Yoder*, the Court has reaffirmed the parental rights noted in *Pierce* and *Meyer*.[157] With the renaissance of substantive due process through fundamental rights, parents today are more likely to argue that guiding the education of their children is a family decision protected by the right of privacy.[158] The Supreme Court has held that certain rights may be characterized as general privacy rights and are protected by the "Fourteenth Amendment's concept of personal liberty."[159] Because this general privacy right can be derived from the due process clause of the fourteenth amendment, there may be little difference in constitutional analysis between a parent's claim utilizing the right of privacy and a parent's claim utilizing the liberty protected in the due process clause.[160]

As the Supreme Court has not been faced with a compulsory education case since *Yoder*, it has also not had the opportunity to extend the right of privacy to parents' right to guide the education of their children. The rights that the Court holds are within the rubric of "privacy" are fundamental, requiring strict scrutiny analysis.[161] Basic familial rights, similar to parents' right to guide the

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[157] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 505 (1977) (the Court analogized the rights being adjudicated with "[d]ecisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection"); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (the Court cited *Pierce* and *Meyer* in noting that it "has long recognized that freedom of personal choice in matters of family life is one of the liberties protected by the due process clause of the Fourteenth Amendment"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (the Court noted that "[t]he rights to conceive and to raise one's children have been deemed 'essential'"); Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) (although the Court refused to delve into substantive due process for economic problems, the Court categorically stated, "we affirm the principle of the *Pierce* and *Meyer* cases").

[158] BREST & LEVINSON, *supra* note 119, at 657–63.

[159] Roe v. Wade, 410 U.S. 113, 152 (1973) (the Court mentioned the fourteenth amendment, the first amendment, the penumbras of the Bill of Rights, and the ninth amendment as possible sources of the right of privacy, but the majority chose the fourteenth amendment).

[160] Runyon v. McCrary, 427 U.S. 160, 178 n.15 (1976) (the Court noted that "[t]he Meyer-Pierce-Yoder parental right and the privacy right . . . may be no more than verbal variations of a single constitutional right"); *see also* Roe v. Wade, 410 U.S. 113 (1973). The *Roe* Court held that "the Court or individual Justices have, indeed, found at least the roots of that right in the . . . concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . . [T]hese decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" *id.* at 152, are included in this general privacy right.

[161] *See, e.g.*, *Roe*, 410 U.S. at 152–54 (the Court held that the right of privacy extended to a mother's right to abort a fetus, and that the right was fundamental).

education of their children, are often considered fundamental rights.[162] For example, the Court has held fundamental rights to exist in such areas as procreation, marriage, and living arrangements.[163]

To support the recognition of fundamental rights under the right of privacy, the Court invariably relies on the holdings in *Pierce* and *Meyer* to create the context in which a right may be defined as fundamental.[164] For example, in *Roe v. Wade* the Court recognized a mother's right to abort a fetus as a fundamental right within the right of privacy.[165] In reaching its decision, the Court stated that its past decisions reflected similar protections for those personal rights deeply rooted in our society, citing both *Pierce* and *Meyer*.[166] Thus, the Court noted in dicta that the right of privacy extends to other rights such as "child rearing and education."[167]

For a right to be fundamental it must be rooted in the traditions of our society.[168] As noted above, the Court found parents' rights to guide the education of their young to be "an enduring American

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[162] *Roe*, 410 U.S. at 152–54; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 985–87 (1978).

[163] *See, e.g., supra* notes 17, 161. The Supreme Court has held that the right to an education is not fundamental. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). The *Rodriguez* Court held that the tax system used to fund public schools in Texas did not disadvantage a suspect class or interfere with a fundamental right. *Id.* The Court ruled that there is no fundamental right to be educated by the state. *Id.* at 35–37. According to the Court, the importance of the service of education does not determine whether it is a fundamental right. *Id.* at 30. The Court affirmed this decision in Plyler v. Doe, 457 U.S. 202, 223 (1982), where it held that withholding funds for the public education of children who were not "legally admitted" into the country is constitutional. In *Plyler*, the Court held that education is not a fundamental right so as to require the state to show it has a compelling interest in not financing the public education of aliens. *Id.* at 216–24. These cases do not touch on parents' right to guide the education of their children as discussed in this note. The cases discussed in this note involve parents who are not demanding public education, but wish to take responsibility for educating children on their own.

[164] *See, e.g., supra* note 168.

[165] Roe v. Wade, 410 U.S. 113, 166 (1973).

[166] *Id.* at 152–53.

[167] *Id.*

[168] Griswold v. Connecticut, 381 U.S. 479, 487, 493 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring). These Justices recognized that the due process clause protects those liberties that are rooted in the traditions and consciences of our people and thus are to be considered fundamental. *Id.*; Roe v. Wade, 410 U.S. at 152–53. *Roe* held that "[d]ecisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* The Court also made it clear that "the right has some extension to activities relating to . . . child rearing and education." *Id.*; *see also* Hennessey, *supra* note 119, at 191–92 (noting that the Court looks to tradition in determining which rights are fundamental).

tradition, at the very heart of the precepts of our country."[169] As discussed earlier, strict scrutiny analysis applies to fundamental rights.[170] Under such an analysis, a state may not impinge on such a right unless the action it is taking is the least restrictive alternative to achieving a compelling state interest.[171]

Thus, parents may argue that their long recognized right to guide the rearing and education of their children is fundamental under either a privacy or liberty theory and that, therefore, courts should subject any state infringements of this right to strict scrutiny analysis. Such an analysis would limit, though not eliminate, the state's ability to regulate schools.[172] The Supreme Court has recognized parents' right to guide the education of their children under the liberty protected by the fourteenth amendment due process clause. Although such use of the due process clause fell into disfavor, the due process clause has seen a renaissance in the guise of the right of privacy. Further, the Court has not waivered from its earlier decisions recognizing this important parents' right. The Court has recognized similar rights as fundamental under the right of privacy. It has, in fact, extended that right to education in dicta. Thus, in the Supreme Court's attempts to reconcile parents' rights to educate their children with the state's interest in compulsory education, the Court applied a balancing test that limited the state to reasonable actions.

B. *Parents' Rights Under the First Amendment*

Parents who object to state approved schooling upon religious grounds often seek the protection of the free exercise clause of the first amendment of the Constitution.[173] The first amendment reli-

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[169] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[170] *See supra* note 13.

[171] *Id.*

[172] *Id.* Application of a strict scrutiny framework limits state action to the least restrictive alternative needed to achieve the basic education of all children. *Id.* Parents' rights to choose the type of education desired for their children does not extend to controlling public schools. *See generally supra* note 163.

[173] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 208–09 (1972) (parents of Amish children required that children leave school at fourteen as part of their religious lifestyle). The Supreme Court extended the prohibitions of the first amendment free exercise clause to state and local governments by the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see also* New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293, (D. Mass. 1987) (free exercise and establishment clauses); Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987) (free exercise and establishment clauses); *Yoder*, 406 U.S. 205 (1972) (free exercise clause).

gious protections of the free exercise clause arise from the language, "[c]ongress shall make no law . . . prohibiting the free exercise" of religion.[174] Parents have claimed that state statutes, as enforced or on their face, interfere with their right to exercise their religion freely.[175] The Supreme Court has defined "free exercise" as both the freedom to hold religious beliefs and the freedom to act in accord with those beliefs.[176] Courts recognize the freedom to believe as absolute; the freedom to act, however, is viewed as not "totally free from legislative restrictions."[177] The individual must have a "sincere belief" on which the state has placed a burden.[178]

The Supreme Court did not apply the first amendment to compulsory education cases in its decisions in the 1920s.[179] The Court's decision in *Yoder*, however, directly rested on the free exercise clause.[180] The Court in *Yoder* adopted the balancing framework used in *Pierce*, *Meyer*, and *Farrington*, and applied it to the first amendment free exercise clause.[181] The Court recognized the importance of state and parent interests in its decision.[182] The statute, which compelled school attendance until a child became sixteen years old, when applied to the Amish would require them to choose between following their religion or breaking the law.[183] The Court ruled that the statute placed a burden on a sincere religious belief, the litmus test to determine a violation of the free exercise clause.[184] Because the Court has held that such religious rights are not absolute, the Court was forced to decide whether the state placed too

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[174] U.S. CONST. amend. I. Much case law has been required to define what amount or type of conduct constitutes an infringement of this right. *See infra* notes 122–24 and accompanying text. Most of these cases do not deal with compulsory education, but help to define what constitutes an impingement on this right. *Id.*

[175] *See New Life*, 666 F. Supp. at 294–95; *Charles*, 399 Mass. at 325, 504 N.E.2d at 594; *Yoder*, 406 U.S. at 208–09.

[176] Braunfeld v. Brown, 366 U.S. 599, 607–09 (1961) (Court held that statute prohibiting retail sale of clothing and home furnishings on Sundays neither violated Jewish appellant's right of free exercise of religion nor constituted a violation of the establishment clause).

[177] *Id.* at 603.

[178] Thomas v. Review Bd., 450 U.S. 707, 717–18 (Court held that the "state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling interest").

[179] *See* Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[180] Wisconsin v. Yoder, 406 U.S. 205, 231–35 (1972).

[181] *Id.*

[182] *Id.* at 220–35.

[183] *Id.* at 219–20.

[184] *Id.* at 216–19.

great a burden on the Amish's sincere religious beliefs.[185] The Court noted that "cases such as this one call for delicate balancing of important but conflicting interests."[186]

The *Yoder* Court noted that neither the state's nor the parents' interest was absolute.[187] The Court acknowledged the weight of each interest, commenting that the state interest in "providing public schools ranks at the very apex of the function of a State."[188] Although the Court delineated the problem of balancing the interests in the case before it, it did not provide a roadmap for future courts to follow, but merely noted a number of factors courts should consider in resolving these conflicting interests.[189]

Upon consideration of these factors, the Court held that the goals of compulsory education would not be thwarted by allowing the Amish children to leave school at fourteen years of age. Among the factors the Court weighed was the length of time the Amish have held their beliefs.[190] The Court implied that it was impressed with the long history of the Amish.[191] In addition, the Court focused on the Amish reputation for lawfulness and aggrandized the farming lifestyle that the Amish lead.[192] The Court reasoned that ensuring that citizens become independent and successful in society is one of the most basic rationales behind the state interest in education.[193] After considering these factors, the Court was satisfied that the Amish children would be able to function successfully in society even if they later chose to leave the order.[194] The *Yoder* Court was thus convinced that the Amish children satisfied the essence of the state interest in education, and was not convinced that the two years of schooling that the Amish children would miss would be crucial to their future successful participation in society.[195] Thus, the Court balanced the state's interest in education with the Amish parent's first amendment rights.[196]

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[185] *Id.* at 259.
[186] *Id.* at 237 (White, J., concurring, joined by Brennan, J., & Stewart, J.).
[187] *Id.* at 234–35.
[188] *Id.* at 213.
[189] *See Yoder*, 406 U.S. 205.
[190] *Id.* at 219.
[191] *Id.*
[192] *Id.* at 213, 222.
[193] *Id.* at 221.
[194] *Id.* at 222–26.
[195] *Id.* at 222.
[196] *Id.*

Although the Supreme Court has not decided other compulsory educational cases since *Yoder*, subsequent Court decisions have dealt with cases based on similar first amendment free exercise claims.[197] In these cases the Court adopted a strict scrutiny framework in dealing with the free exercise clause.[198] Under strict scrutiny, the Court dispensed with balancing interests and, therefore, no longer differentiated between the weight given various constitutional claims either individually or collectively.[199] Under this new framework, when a state infringes upon a right protected by the free exercise clause of the first amendment, strict scrutiny necessarily applies.[200]

The Supreme Court set out this new framework in a series of cases that did not concern education.[201] For example, the Supreme Court in its decision in *Thomas v. Review Board, Indiana Employment Security Division*[202] struck down state laws that placed a burden on an individual's sincere religious beliefs.[203] The Court spoke not of balancing, but of least restrictive alternatives.[204] In *Thomas*, the Court noted that once a state law or its enforcement has violated the free exercise rights of the claimant, "the state may justify an inroad of religious liberty by showing that the law in question is the least restrictive means of achieving some compelling state interest."[205] The Court in *Thomas* held that the state law denying unemployment benefits to people who voluntarily left their job was unconstitutionally applied to someone who felt compelled to quit because of religious reasons.[206] The Court noted that Thomas re-

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[197] *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1981) (Court held that the imposition of social security taxes was not unconstitutional in light of first amendment free exercise claims presented); Thomas v. Review Bd., 450 U.S. 707 (1981) (Court held state's denial of unemployment compensation to Jehovah's Witness violated his first amendment rights); *see also infra* note 212.

[198] *Lee*, 455 U.S. at 257–58 (Court noted that the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest); *Thomas*, 450 U.S. at 718–19 (Court noted that only if the state utilized the least restrictive means to achieve a compelling state interest could the state justify an inroad on religious liberties).

[199] *See generally supra* notes 1198, 13.

[200] *See* NOWAK, ROTUNDA & YOUNG, *supra* note 119, at 1060–61.

[201] *See infra* notes 202–16 and accompanying text; *see also supra* notes 197–200 and accompanying text.

[202] 450 U.S. 707 (1981) (state's denial of unemployment compensation to Jehovah's Witness violated his first amendment rights).

[203] *Id.* at 718–20.

[204] *Id.* at 718.

[205] *Id.*

[206] *Id.* at 718–20.

fused to help produce weapons and asked to be laid off; when the company refused, he was forced to quit.[207] The Court found that the state law, as applied to Thomas, forced him to choose between violating state law or violating his religion.[208] The Court ruled that the state interest in denying unemployment benefits to Thomas was not compelling.[209] The test used in *Thomas* is clearly different from the direct balancing inherent in the reasonable standard employed in *Yoder*.[210] Thus, the Court has held that if the state action burdens a claimant's religious beliefs, the state may continue its actions only if the state has a compelling interest, and if the action taken is essential to carry out the state interest or is the least restrictive alternative.[211]

The movement to refine the analytical process continued in *Hobbie v. Unemployment Appeals Council of Florida*.[212] In *Hobbie*, the Court was again faced with an individual who refused to work on his or her sabbath and was denied unemployment benefits.[213] In holding that the statute violated the free exercise clause of the first amendment, the Court stated that strict scrutiny should apply whenever a first amendment right is at stake.[214] Strict scrutiny places the burden on the state to show that its interest is compelling, that its interest would be substantially harmed if the actions it sought to undertake were disallowed, and that its actions are essential or the least restrictive alternative.[215]

Thus, the Supreme Court has applied strict scrutiny in cases where the free exercise clause is infringed upon. The Court has not, however, had the opportunity to apply strict scrutiny to a compulsory education conflict in which the free exercise clause is involved.[216] It therefore remains an open question whether the Court would analogously apply strict scrutiny to compulsory education cases.

The Court has not had the opportunity to apply strict scrutiny analysis in compulsory education cases involving either or both the

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[207] Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

[208] *Id.* at 717–18.

[209] *Id.* at 719.

[210] *See supra* notes 179a–195 and accompanying text to compare to the test applied in *Thomas* with the "reasonableness" test.

[211] *Thomas*, 450 U.S. at 718.

[212] 107 S. Ct. 1046 (1987).

[213] *Id.* at 1047–48.

[214] *Id.* at 1049.

[215] *Id.* at 1049–50.

[216] *See supra* notes 197–215 and accompanying text. *See also supra* note 13.

fourteenth amendment and the first amendment. Some lower courts have, however, assumed such an analysis must logically be applicable in either case.[217] The absence of a ruling by the Supreme Court has left courts without guidance. What framework should be applied, and within that framework, what are the boundary lines of state and parent interests? Two recent Massachusetts cases decided within months of one another in 1987 illustrate the differing ways in which courts now analyze and decide this controversy.

III. Current Massachusetts Decisions: An Example of States' Confusion

The absence of a recent Supreme Court ruling, coupled with broadly written state statutes, has forced each state court to adopt its own framework and boundary lines when confronted with the compulsory educational issue. In *Care and Protection of Charles*, the Supreme Judicial Court of Massachusetts held that the Massachusetts compulsory education statute was constitutional both on its face and in its application by the school committee of the Canton school system.[218] The court primarily balanced the parent's claims with the state interest, deciding that the state had properly forbidden the parents to teach their children at home because the parents had not fully complied with the school committee's regulations.[219]

In *Charles*, a couple wished to educate their three children at home because of religious convictions. The parents argued that, as Christian parents, they were committed to teaching and raising their children in the truths of the Bible.[220] Although the parents were willing to provide a table of contents of their proposed curriculum, they did not agree to school committee requirements that they allow school visits for observation, document their educational backgrounds, permit standardized testing, or state the number of hours and days that would be devoted to their children's instruction.[221]

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[217] *See, e.g.*, New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987) (court applied strict scrutiny in analyzing first amendment free exercise and establishment clauses); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (court held that state standards relating to operation of schools was not the least restrictive alternative and thus was unconstitutional in light of parents' fourteenth and first amendment rights).

[218] *Charles*, 399 Mass. at 340, 504 N.E.2d at 602.

[219] *Id.* at 336–40, 504 N.E.2d at 599–602.

[220] *Id.* at 325, 326, 504 N.E.2d at 594.

[221] *Id.* at 327–28, 504 N.E.2d at 594–95.

The parents argued that the statute was too vague in calling for "equivalency" and violated their first and fourteenth amendment rights.[222]

The court rejected the parent's first argument that the statute was unconstitutionally vague.[223] The court held that the statute met the standard that a "detailed specification of standards is not required" in order that a statute withstand scrutiny. Further, the court noted that the legislature intended that the approval process set out for private schools be analogous to that for home schools.[224] Thus the school committee was bound to follow the process as set out in the statute.[225]

The parents also claimed that the statute as applied interfered with their constitutionally protected first and fourteenth amendment rights.[226] The court did not discuss the first amendment rights because it held that the rights protected by the free exercise clause would afford the parents no greater protection than the right to direct the education of one's children found in the fourteenth amendment due process clause.[227] The court made no explanation for this distinction.[228]

After noting the importance of both the state's and the parents' interests, the court stated that the school committee can and should enforce "reasonable educational requirements."[229] The court also stated that requirements for approval of a home school must be essential to the state interest in ensuring that "all the children are educated."[230] Thus the court at the same time asked that the state

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[222] *Id.* at 330, 504 N.E.2d at 596–97.

[223] *Id.* at 330–33, 504 N.E.2d at 596–98.

[224] *Id.* at 330, 331, 504 N.E.2d at 97.

[225] *Id.* at 333, 504 N.E.2d at 598.

[226] *Id.*

[227] *Id.* at 333 n.8, 504 N.E.2d at 598 n.8. The court stated that "a basic right under the Fourteenth Amendment is directing the educational upbringing of their children subject to reasonable government regulation. . . . The free exercise of religion claims under neither the United States nor the Massachusetts Constitution would entitle the parents to any greater protection than we grant them in this opinion." *Id.* Note that the court states the fourteenth amendment entitles the claimant to rights subject to "reasonable" regulation. *Id.*

[228] Perhaps the court intended to apply a strict scrutiny analysis. Under such analysis, it would not matter which fundamental rights were impinged upon, so long as one such right was violated, in order to trip strict scrutiny. *See supra* note 13. *See also supra* notes 179–95, 197–215. The court, however, did not apply strict scrutiny and it would be unusual for a court not to discuss such important fourteenth amendment claims.

[229] Care and Protection of Charles, 399 Mass. 324, 336, 504 N.E.2d 592, 599–600 (1987).

[230] *Id.* at 337, 504 N.E.2d at 600.

enforce reasonable requirements, and only those that are essential.[231] The court, therefore, seemed to oscillate between a *Yoder*-like balancing test and the modern strict scrutiny analysis.

As in *Yoder*, the Supreme Judicial Court provided guidelines as to how far the state may permissibly go in regulating alternative education. The court in *Charles* held that parents must obtain approval, and obtain it prior to the children's leaving school. The court stated that the parents must be given a chance to explain their program, and, if turned down, a chance to appeal.[232] Furthermore, the court held that if the parents begin teaching without approval, the burden of proof is placed on the school committee to show that the instruction will not equal "in thoroughness and efficiency, and in progress made therein that in the public schools in the same town . . . ."[233]

The court set out standards which the school committee or state may use as a guide to school acceptance.[234] Under those standards, a school committee may require certain basic subjects be taught, and may properly consider the length of the proposed school year and the hours of instruction in each subject. The committee may examine the competency of the parents or proposed teachers, but may not require that parents be certified or have a college or advanced academic degree. The committee must have access to all instructional aids children will use, including lesson plans and teaching manuals to be used by the parent or teacher.[235] The court stated that the school committee may not use these manuals to dictate the manner in which subjects will be taught, but may examine them only to ensure that the state interest is satisfied by determining the type of subjects and the grade level of instruction.[236] Finally, the committee may require periodic standardized testing to ensure educational progress and the attainment of minimum standards.[237] Thus, the court permitted the school committee considerable leeway in determining reasonable requirements for home school approval.[238]

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[231] *Id.* at 336–37, 504 N.E.2d at 599–600.

[232] *Id.* at 337, 504 N.E.2d at 600.

[233] *Id.* at 338, 504 N.E.2d at 601, *see also* MASS. GEN. L. ch. 76, § 1 (1986).

[234] *Id.* at 338, 504 N.E.2d at 601. The school committee acts on behalf of the state; therefore, this note will use the two terms interchangeably.

[235] *Id.* at 338–39, 504 N.E.2d at 601–02.

[236] *Id.* at 339, 504 N.E.2d at 601–02.

[237] *Id.* at 339–40, 504 N.E.2d at 601–02.

[238] *Charles*, 399 Mass. at 324, 504 N.E.2d at 592.

The "reasonableness" framework the Supreme Judicial Court applied in *Charles* contrasts with the framework that the United States District Court for the district of Massachusetts used in *New Life Baptist Church Academy v. Town of East Longmeadow*.[239] The court in *New Life*, decided four and one-half months after *Charles*, applied a strict scrutiny analysis and enjoined a school committee from applying its particular approval process to an unapproved private school and to the parents of "truants."[240] The court held that a strict scrutiny framework was best suited to analyze the first amendment claims that the plaintiffs raised.[241]

The plaintiffs in *New Life*, New Life Baptist Church Academy and the parents of children who attended the school, argued that the approval process for private schools[242] required by the East Longmeadow school committee interfered with their constitutional rights under the first amendment free exercise clause.[243] The plaintiffs did not object to most of the school committee's requirements, agreeing to provide a copy of the curriculum, to teach the required subjects for the required hours, to disclose identities of students and the qualifications of their teachers, and to permit standardized testing.[244] The plaintiffs did, however, object to the requirement that they ask for approval; the plaintiffs claimed that the approval requirement interfered with their religious beliefs.[245] To seek accreditation from the state, according to the plaintiffs, was a sin because it placed the authority of the state above the authority of God. They further argued that the requirement of on-site inspections and college degrees for teachers constituted an entanglement between church and state.[246]

The court in *New Life* applied strict scrutiny analysis, noting that, although the Supreme Court had not applied such analysis to compulsory education cases, the Court recently had applied strict

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[239] 666 F. Supp. 293 (court applied strict scrutiny); *cf. Charles*, 399 Mass. 324, 504 N.E.2d 592 (1987) (court primarily applied a reasonableness or balancing test).

[240] *New Life*, 666 F.Supp. at 327–28.

[241] *Id.* at 312–13.

[242] The approval process as detailed in MASS. GEN. L. ch. 76, § 1, was interpreted to apply to both private schools and home schools in the same fashion. *Charles*, 399 Mass. at 331, 504 N.E.2d at 597. Thus, the basis for the approval process in *New Life* for a private school is synonymous with that in *Charles* for a home school.

[243] *New Life*, 666 F. Supp. at 325–28. The plaintiffs also raised claims under the establishment clause. *Id.* This note will not discuss claims under the establishment clause.

[244] *Id.* at 294–95, 298.

[245] *Id.*

[246] *Id.* at 294, 295.

scrutiny to other first amendment claims.[247] The court in *New Life* held that the approval process adopted by the school committee infringed on the plaintiff's free exercise of religion.[248] The court also recognized that the state had a compelling interest in compulsory education.[249] The court concluded that the critical question was whether East Longmeadow proved that its approval process was the least restrictive means of assuring that the children who attend New Life Academy were adequately educated.[250]

The court rejected the school committee's plea that the state interest should be defined more broadly.[251] The committee argued that "an essential purpose of education is to instill in children a 'thirst for knowledge' and the reasoning skills to satisfy that thirst."[252] The court found that this argument included the notion that students need the capacity to question the religious faith they share with their parents.[253] The court held that attempting to equip children with the tools to question their own religious faith was not a proper state goal and exceeded the state's legitimate interest in basic education.[254]

After refusing to expand the state's interest, the court in *New Life* held that the approval process set out by the school committee was not the least restrictive alternative of meeting this interest.[255] The court ruled that there were alternative ways of ensuring the state statutory interest in education.[256] Although it did not set out specific criteria, the court suggested that the following criteria might suffice. First, the school must provide basic information to the school committee regarding the students and the curriculum. Sec-

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[247] *Id.* at 313 & n.13. The court noted that, although *Yoder* suggested "a balancing approach may be applicable to First Amendment claims, . . . [t]he evolution of the law since *Yoder* . . . persuades this court that a balancing of competing interests is not now permitted in deciding free exercise issues such as decided in this case." *Id.*

[248] *Id.* at 319–20.

[249] *Id.* at 307, 317–19 & n.15.

[250] *Id.* at 313.

[251] *Id.* at 317, 318.

[252] *Id.* at 305–18.

[253] *Id.* at 307.

[254] *Id.* at 318–19.

[255] *Id.* at 319–20.

[256] *Id.* at 320. The court suggested that the least restrictive alternative might entail,

"1. Basic information on students, school and curriculum and

2. Standardized testing combined with individual follow-up when indicated or

3. The requirements in #2 combined with a requirement that each teacher have appropriate academic credentials."

Id.

ond, the children ought to be given standardized tests with appropriate follow-up at the end of each school year.[257] The court left open the possibility that some type of official teacher certification might be required.[258] Thus the court held the East Longmeadow school committee's approval process unconstitutional as alternatives existed that would be less restrictive and nonetheless satisfy the state interest in ensuring the basic education of all children.[259]

In summary, the courts in these two cases applied different frameworks of analysis to basically similar facts. The Massachusetts statutory requirements are identical for home or private schools. The school committees had promulgated similar regulations, requiring a request for approval, standardized testing, the teaching of certain core courses, and basic information about curriculum, students, and teachers. The parents in both cases contended that the regulations violated their first amendment rights, though the parents in *Charles* also raised fourteenth amendment issues. In *Charles* the court chose to ignore the first amendment claims and focus solely on the parents' fourteenth amendment rights to guide the education of their children. The court in *Charles* ruled that the claimant would receive the same protection under the fourteenth or first amendment. The court in *Charles* applied a balancing test whereas the court in *New Life* applied strict scrutiny. Thus, the courts applied completely different frameworks of analysis to similar facts. The absence of a current Supreme Court case helps create this situation in which it is unclear how courts should analyze compulsory education claims.

IV. Analysis

Courts ought to apply strict scrutiny to compulsory education claims under either the first or the fourteenth amendment. Applying strict scrutiny will properly protect parents' rights by allowing state action which infringes upon those rights only if such action is circumscribed to what is essentially needed to fulfill a state's interest in education. Further, the application of strict scrutiny may yield more consistent results.

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[257] *Id.*

[258] *Id.* at 321. The court noted that "it is not necessary or appropriate for this court to decide now whether requiring certain academic credentials . . . is a component of the least restrictive means for the state to assure that New Life students are adequately educated." *Id.*

[259] *Id.* at 325–28.

The two cases above highlight both the use of conflicting frameworks and the problems that ensue from the use of these different frameworks. The court in *Charles* primarily applied the balancing process outlined by the Supreme Court in *Yoder* while paying lip service to the "least restrictive" language of the strict scrutiny doctrine.[260] The *Charles* court enforced reasonable educational requirements while stating that enforcement should be limited to requirements that are essential to fulfilling the state interest.[261] These views are necessarily contradictory. A reasonableness test requires the application of a balancing framework — the court ensuring that state regulations are reasonably related to legitimate state goals and that the regulations do not unreasonably infringe upon parent rights.[262] A strict scrutiny analysis, however, is implicated automatically upon the infringement of a fundamental right; a court thus requires that the state action be essential for the achievement of the state interest.[263] Thus the *Charles* court failed to clearly apply a strict scrutiny analysis where the infringement of the parents' fundamental rights entailed such scrutiny. The *Charles* court seemed to conceptually confuse the two distinct frameworks of analyses.

In contrast to *Charles*, the court in *New Life* clearly applied strict scrutiny.[264] The court made clear that it "is not called upon to balance its perception of the weight of the burden on an individual's religious belief against its assessment of the importance of the competing state interest."[265] The court found the claimant's beliefs sincere and held that the state's regulations infringed upon those beliefs.[266] Thus, because the state's regulations infringed upon the plaintiff's free exercise of religion, the court applied strict scrutiny analysis and held that the regulations were unconstitutional.[267]

The facts in these cases were not so significantly different as to warrant the application of different frameworks. Both cases involved the same statutory authority and similar school committee regulations.[268] In both cases the claimants relied on the first amend-

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[260] *See Charles*, 399 Mass. at 336, 504 N.E.2d. at 599–600 (the court did not mention fundamental rights in its analysis).

[261] *Id.*

[262] *See supra* notes 140–42.

[263] *See supra* notes 143–45, 171, 215 and accompanying text.

[264] *New Life*, 666 F. Supp. 293, 219–20.

[265] *Id.* at 313.

[266] *Id.* at 325–28.

[267] *Id.*

[268] *See supra* text accompanying notes 224, 221 & 245.

ment, though in *Charles* the claimant also relied on the fourteenth.[269] The only significant difference between these cases was that the claimants in *New Life* agreed to follow most of the committee's regulations, whereas the claimants in *Charles* did not.[270] Such a difference might warrant a court making different conclusions within one framework, but does not warrant applying completely different frameworks altogether.

The application of different frameworks may necessarily produce different results. The balancing test utilized in the early Supreme Court cases and in *Charles* asks only that the state action be reasonable.[271] Strict scrutiny, by contrast, requires that the state action be the least restrictive alternative to achieve a compelling state interest.[272] Assuming that the state interest in basic education is compelling, the two tests may arrive at different results.[273] For example, the requirements set out by the school committee in *New Life* may well have been reasonable, although judged not the least restrictive alternative.[274] To be the least restrictive alternative, an action must be more than reasonable; there must not be an alternative to that action that is feasible for the state to enforce.[275] Strict scrutiny analysis therefore places greater limits upon the state's power to promulgate educational regulations than a "reasonableness" analysis. Thus, the courts in *Charles* and *New Life* employed different frameworks, frameworks that necessarily may render divergent holdings.[276] The facts in these cases were similar enough

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[269] *See supra* notes 226, 241 and accompanying text.

[270] *See supra* text accompanying notes 221, 245.

[271] *See supra* note 227, and accompanying text.

[272] *See supra* note 13 and accompanying text.

[273] The Supreme Court has not determined that the state interest is compelling, but considering the value the Court has placed in this interest, it is likely that the interest is a compelling one. *See, e.g.*, Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, at 402 (1923). Further, the Court would be likely to find the interest compelling because, without a compelling interest, the state would have no ability to regulate the parents' fundamental right within a strict scrutiny framework. *See supra* note 13.

[274] New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293, 295–98 (D. Mass. 1987).

[275] *See supra* note 13.

[276] In both cases parents contended that the local school board's regulations went too far in violating their first amendment rights, though the parents in *Charles* also raised fourteenth amendment issues. *See supra* notes 226–27, 247–50 and accompanying text. The Massachusetts statutory requirements are the same for home or private school education. *See supra* note 224 and accompanying text. Both school committees required similar regulations, calling for standardized tests, the presentation of basic information, teaching certain core courses, and some official observation. *See supra* notes 221, 245. Thus, the fact the parents in *Charles*

that courts, utilizing the same framework, should reach the same result in each case.

Courts ought to analyze any compulsory education case in which there are claims based on the first amendment free exercise clause with a strict scrutiny framework. Since the Supreme Court's decision in *Yoder*, in which it analyzed first amendment concerns within a balancing framework, the Court has held that an infringement of the free exercise clause triggers strict scrutiny analysis.[277] If a state statute places a burden on parents' sincere religious beliefs concerning the education of their children, the court should follow Supreme Court precedents and apply strict scrutiny.

Thus, the *New Life* court correctly applied strict scrutiny when it determined that the school committee's regulations were burdening the parent's religious beliefs.[278] The *Charles* court chose not to discuss the first amendment claims raised by the claimant, holding that such claims would not entitle the claimant to any more protection than the claimant was entitled to under the fourteenth amendment.[279] The *Charles* court did not, however, apply strict scrutiny to the general fourteenth amendment claims.[280] This suggests that the court assumed either that first amendment claims do not require a strict scrutiny analysis or that the particular regulations in question did not amount to a state infringement on the parents' sincere beliefs.[281] The court is clearly wrong if it asserts the former, and is within its discretion if it asserts the latter.[282] In either case, the court in *Charles* never made clear its reasoning in what was certainly a questionable decision. In sum, if parents make a first amendment claim and a court determines that the state burdened the parents' sincere religious beliefs, the court must apply strict scrutiny.[283]

Courts ought also to analyze all compulsory education claims brought under either the right of privacy or the liberty component

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objected to most of these requirements whereas the parents in *New Life* did not is not something basic to analysis, but rather something fact specific. *Id.* This type of factual distinction does not warrant the application of different frameworks of analysis.

[277] *See supra* notes 177–216 and accompanying text.

[278] *New Life*, 666 F.Supp. 293, 312–13, 325–28.

[279] Care and Protection of Charles, 399 Mass. 324, 333–34 n.8, 504 N.E.2d 592, 598 n.8 (1987).

[280] *Charles*, 399 Mass. at 331, 340, 504 N.E.2d at 597, 602.

[281] The court would not apply strict scrutiny in either *Charles* or *New Life*. *See supra* note 13 for a discussion of strict scrutiny.

[282] This note is thus asserting only that strict scrutiny ought to apply to first amendment claims and does not purport to argue that the court would have abused its discretion in ruling that the state action was insufficient to cause a burden on the plaintiffs.

[283] *See supra* notes 13, 197–216 and accompanying text.

of the due process clause of the fourteenth amendment with a framework of strict scrutiny. Although the Supreme Court has not had the opportunity to hold that parents' right to guide the education of their children is fundamental, the Court has held that similar familial rights are fundamental, and require strict scrutiny analysis.[284] Before the advent of strict scrutiny, the Court held that such parental rights were the cornerstone of our society, at the very heart of our nation.[285] The only exception to the force with which the Supreme Court held this view, was the unexplained denigration of the fourteenth amendment in *Yoder*.[286] Even in *Yoder*, however, the Court noted that the general right of parents in guiding the upbringing of their children was beyond debate.[287] The *Yoder* view of the fourteenth amendment is best explained as a throwback to the Court's dislike of substantive due process.[288]

The Supreme Court's attitude about substantive due process changed as the doctrine reemerged in the years after *Yoder*.[289] With the onset of strict scrutiny analysis, the Court has continually reaffirmed and analogized to the holdings of *Pierce* and *Meyer* in recognizing other familial rights.[290] If the Court found parents' right to guide the education of their children fundamental, it would apply the strict scrutiny framework upon determining that the state had infringed upon this right.[291]

In sum, courts should utilize the strict scrutiny framework whether claims are brought under the first or fourteenth amendment in compulsory education cases. Courts ought to adopt strict scrutiny so that litigants may be assured of consistency as to how their claims will be viewed. More importantly, however, strict scrutiny ensures that the parents' interest in guiding the education of their children, which is a right basic to our notions of freedom, is well protected. Although a state's interest may be compelling, a state should not be able to impinge on important parental rights without overcoming the burden of proving that its actions are the least restrictive means towards its ends.

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[284] *See supra* notes 161 and 17.

[285] *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[286] *Yoder*, 406 U.S. at 206.

[287] *Id.* at 232.

[288] *See supra* note 119.

[289] *Id.*

[290] *See supra* note 157.

[291] *See supra* note 13.

Although applying this framework of analysis will aid courts in reconciling the interests involved, it will not solve the problem of determining where to set the boundaries of the state interest. Unfortunately, creating a clear line between parents' rights and the state interest, although perhaps aided by applying a consistent framework, remains a difficult task. The Supreme Court itself has noted that it is ill-prepared to delve into the particulars of educational practices.[292] The *Charles* court agreed with the Supreme Court, quoting from *Yoder*, that "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."[293] In both *Charles* and *New Life*, the courts left to the litigants and the lower courts the task of deciding what regulations were essential or required.[294] If courts consistently were to apply a strict scrutiny framework, they would still have to decide which state actions were essential to achieving the states' interest in basic education.

Despite recognizing their limitations, courts have been willing to offer some guidance as to where these boundaries might lie.[295] Thus, although the courts have applied different frameworks, they have generally agreed that certain requirements are essential to achieve the goal of basic education.[296] For example, courts agree that a state has the right to obtain information from alternative schools regarding students and curriculum.[297] This information is needed so that the school district will know where the children are and what subjects the school will teach. Courts have allowed states to require that schools teach certain core subjects and that children spend a specified amount of time in instruction.[298] Thus, the state interest in basic education can encompass a range of courses, usually

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[292] *Yoder*, 406 U.S. at 235.

[293] Care and Protection of Charles, 399 Mass. 324, 337, 504 N.E.2d 592, 600 (1987).

[294] New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); *Charles*, 399 Mass. 324, 504 N.E.2d 292.

[295] *Charles*, 399 Mass. at 337, 504 N.E.2d at 600.

[296] Because some of these requirements come from courts applying strict scrutiny, and some come from courts that did not, this list is not determinative or absolute. It is, however, a good indication of what a court might consider are essential means of achieving the state interest.

[297] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987).

[298] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987); *see also* MASS. GEN. L. ch. 71, §§ 1–3 (1982).

including national and state history, reading, writing, and arithmetic.[299] To ensure that the children receive an adequate amount of instruction, regulations prescribe the hours per day, days per year, and even hours per subject.[300] To further ensure that children are being provided the basic education, courts may require some form of standardized testing.[301] By taking such tests, the state can compare a student's progress with other students within the state.[302] Teacher certification and other issues, however, remain undecided.[303] The Supreme Court has noted that courts are ill equipped to delineate what exact programs or learning tools are essential to fulfilling the states' interest in education.[304] These decisions are complex because they involve different theories of education as well as the need to allow alternative schools flexibility.[305]

A further complicating factor in attempting to reconcile these interests is the question of whether the state interest should permit broader state involvement in alternative schooling. In both *New Life* and *Yoder*, the state argued that to achieve its recognized interest of preparing children to be economically independent and to learn the skills and values necessary to perpetuate our democracy, children need more than the basics.[306] Massachusetts also argued that the state interest ought to include ensuring that children become independent thinkers so that they can make intelligent choices regarding religion.[307] Courts have not and should not accept such arguments.

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[299] *See, e.g., Charles*, 399 Mass. at 338–39, 504 N.E.2d at 601 (quoting MASS. GEN. L. ch. 71, §§ 1–3 (1982)); *Yoder*, 406 U.S. at 226 n.14.

[300] *Charles*, 399 Mass. at 338–39, 504 N.E.2d at 601.

[301] *See, e.g., New Life*, 666 F. Supp. at 303–06, 321 (contains a broad discussion of standardized testing and its reliability).

[302] *Id.*

[303] *See id.* at 321–22, 324 (discussion of teacher certification).

[304] *Yoder*, 406 U.S. at 235. The Court recognized the "obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Id.*

[305] State v. Whisner, 47 Ohio St. 2d 181, 206–123, 51 N.E.2d 750, 765–68 (1976) (requirements that prescribed 4/5this of school day found not to be least restrictive alternative).

[306] *See Yoder*, 406 U.S. at 232 (state desired to ensure that children were able to make "intelligent" decision regarding whether or not they would wish to remain in the community); *New Life*, 666 F. Supp. at 318 & n.15 (state desired to ensure that children would be able to engage in "independent thinking"). The state also noted that Massachusetts, due to its constitution and high-tech economy, had a special interest in ensuring children received more than a basic education. *New Life*, 666 F. Supp. at 318 & n.15. *See supra* note 26 and accompanying text for an explanation of state interest.

[307] *See supra* note 306.

First, courts have correctly made it clear that the state may not attempt to subjugate parents' right to raise their children in their religious faith.[308] It is not a proper interest of the state to attempt to help children question their religious beliefs. Such an interest is obviously at odds with the constitutional protection of free exercise of religion.

Second, it would seem improper for a state to broaden its interest to more than a basic education when it is clear that, at present time, many children are not even receiving these basics.[309] Before a state ought to consider requiring more than a basic education, it must ensure that all children are receiving a basic education. Many people with high school diplomas are functionally illiterate, although ironically, by completing high school, they have attended school longer than is required by most compulsory education laws.[310] Studies have indicated that schooling and literacy do not necessarily correlate.[311] Thus, although children are attending school, many are not learning even a basic education.[312] In light of the current state of our schools, it seems improper for a state to argue that the court should recognize its interest as in more than basic education. Before a state ought to require private and home schools to do more, it must ensure that children are learning the basics.

In addition, although society has grown more complex, a child who is proficient in the basics, as defined by Jefferson, may indeed find him or herself in the minority of American students in the market place.[313] Employers have found that many employees possess basic skill deficiencies in areas such as writing, reasoning, and

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[308] *See, e.g., Yoder*, 406 U.S. at 232; *New Life*, 666 F.Supp. at 318.

[309] D. HARMON, ILLITERACY: A NATIONAL DILEMMA 29 (1987). The number of illiterate adults in America is a hard figure to pin down; low figures estimate that seventeen to twenty one million Americans are illiterate, whereas the high figures estimate seventy two million. *Id.* One indication of the poor education that high school students are offered can be discovered by looking at community college entrants. *Id.* Researcher John Rouech found that such students are "lacking in the basic skills: the most offered courses in American community colleges are remedial reading, remedial writing, and remedial arithmetic." *Id.* at 41. Many scholars have found the condition of the school systems in America to have deteriorated; as Barzun stated, "The once proud and efficient public school system of the United States . . . has turned into a wasteland where vice shares the time with ignorance and idleness." J. BARZUN, TEACHER IN AMERICA (1945).

[310] D. HARMON, *supra* note 309, at 41.

[311] *Id.* at 31.

[312] *See generally* D. HARMON, *supra* note 288; BAILEY & FOSHEIM, LITERACY FOR LIFE: THE DEMAND FOR READING AND WRITING (1983).

[313] *See supra* notes 308–12 and accompanying text.

speaking.[314] Thus, far from being unable to compete in the market place, a student well versed in the basics may be the exception. Finally, the purpose of the state interest of ensuring that citizens have assimilated American values may be achieved through a basic education, whereas attempting to ensure that children are economically independent is not easily solved even if a basic education were being offered.[315]

V. Conclusion

Courts ought to apply strict scrutiny to compulsory education claims brought under either the first or the fourteenth amendment to properly protect parents' rights and to render more consistent decisions. The Supreme Court applies a strict scrutiny framework when a state infringes on a claimant's right to free exercise of religion. If state regulations involving compulsory education infringe upon parents' religious beliefs, by analogy, courts ought to apply strict scrutiny. Assuming that the state interest is compelling, strict scrutiny analysis limits state action to those regulations that are the least restrictive alternative to achieving the state interest.

Courts also analyze fundamental rights with a strict scrutiny framework. The Supreme Court has held that rights similar to parents' right to guide the education of their children are fundamental. The Court has stated in dicta that this right is fundamental and has consistently reaffirmed its importance. Thus, courts ought to consider as fundamental parents' right to guide the education of their children and therefore should analyze an infringement of that right within the framework of strict scrutiny.

A strict scrutiny framework applied by all courts will provide consistency, which is helpful to both parents and the state. Further, parents' right to guide the education of their children warrants the protection that strict scrutiny provides. Courts will not arrest the state interest in education by applying strict scrutiny, but will limit the state to promulgate only those regulations that are essential. In light of the interests involved, this is a reasonable compromise.

In addition, the state interest of educating children ought to remain in basic education, whether or not courts find the state

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[314] *See, e.g.*, D. Harmon, *supra* note 309, at 34.

[315] *Id.* at 42. Harmon notes that, besides a deficiency in education, "[l]ow income, abject poverty, inadequate housing, work instability, family instability, and membership in a minority group — especially Black and Hispanic — are other frequent attributes. Illiteracy is almost always part of an intertwined web of circumstances." *Id.*

interest compelling or apply strict scrutiny. The accepted goals of the state interest in education — successful citizenship and economic independence — demand no more. States ought first to ensure that our children are receiving a basic education before discussing the possibilities of expanding their interest. Finally, a state does not have a valid interest in ensuring that children can question or choose their faith. Such an interest would violate the free exercise clause of the constitution.

Even if courts adopt the strict scrutiny framework there remain difficulties in determining exactly what requirements a state may impose on alternative education and in laying out the boundaries of state and parent interests. Although courts have agreed on some basic requirements, perhaps, as was suggested in *Yoder*, school boards and legislatures are better suited to define these discrete boundaries.

DANIEL J. ROSE