The Interest of the Child in the Home Education Question: *Wisconsin v. Yoder* Re-examined

I. Introduction

In recent years, an unprecedented number of parents have chosen to educate their children at home, a practice which currently shows no sign of subsiding.[1] Home education today may be viewed as something of an anomaly, given the rise of full-time working parents in both one-parent and two-parent households. The popularity of home education may, however, be attributed to a number of reasons, the most significant of which are the perceived inadequacy of the public schools and the rise of religious fundamentalism in the United States.[2]

Parents who make this choice sometimes run afoul of state compulsory education statutes which typically require attendance at a public or private school or an "equivalent."[3] A number of cases arising from this conflict have been litigated, the decision of primary importance coming in 1972 when the United States Supreme Court decided *Wisconsin v. Yoder*.[4] The Court, in responding to a circumstance quite different from most home education situations today,[5] determined that the conflict

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

[2]*Id.* at 193.

[3]Some state statutes simply require attendance at a public or private school, without mentioning other alternatives. *See infra* note 12 and accompanying text. Others provide for alternatives that are "equivalent" to public or private education. Still other statutes are more specific in detailing what will qualify as an equivalent. These equivalency requirements typically include teacher certification, teacher "qualification," minimum number of instructional hours, or coverage of certain subjects. Virginia and Kentucky exempt parents who conscientiously object to sending their children to school from the compulsory attendance requirement. Mississippi dropped its compulsory education statute following *Brown v. Board of Education* (*see infra* note 88), apparently to avoid forcing children to attend desegregated schools. For an outline of the relevant statutes of all the states, see Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353, 379-81 (1980).

Because most states permit home education under certain circumstances, parents who teach their children at home are not necessarily in violation of the attendance statutes. Furthermore, state courts and prosecutors may be lenient in interpreting standards of equivalence. For these reasons, litigation normally occurs in states where there is no home education option, or when parents fail to meet a prescribed requirement and contest the state's power to impose the requirement.

[4]406 U.S. 205 (1972).

[5]The Amish parents in *Yoder* were adherents to a faith that encompassed not only religious values, but community, social, and economic life as well. In contrast, most religious fundamentalists today do not intend to isolate themselves entirely from the rest of society. *See, e.g.*, Burrow v. State, 282 Ark. 479, 669 S.W.2d 441 (1984).

was to be resolved by balancing the free exercise of religion rights of the parents against the interest of the state in compulsory school attendance.[6]

The thesis of this Note is that, while courts have continued to seek guidance from *Yoder* in ruling on home education controversies for the last thirteen years, the case provides an incomplete, unworkable standard. Alternatively, the *Yoder* holding is quite narrow and should be confined to its facts, thus creating the need for courts to formulate their own responses to the controversies that promise to arise in the future. The inadequacy of *Yoder* as authority in home education litigation is reflected in subsequent state and lower federal court decisions which awkwardly circumvent the *Yoder* test or announce holdings difficult to reconcile with *Yoder's* majority opinion. The primary source of this problem stems from the *Yoder* majority's failure to recognize the child's interest as a factor in the balancing test when the rights of parents conflict with the interests of the state. Furthermore, the *Yoder* balancing test has become untenable in light of other Supreme Court decisions which have at least implicitly recognized the importance of education to the child, irrespective of any rights of the parents or interests of the state.

It is important to note that the Court in *Yoder* dealt with a free exercise of religion[7] assertion of the parents, which distinguishes it constitutionally from those situations where parents, for purely academic, social, or other reasons, seek to educate their children at home. Because free exercise is recognized as a fundamental right, the state's interest must be compelling to outweigh it.[8] Apart from a free exercise assertion, the choice of the parent in educating a child has generally been held not to be a fundamental right.[9] Consequently, the state must demonstrate only that it acted reasonably in requiring children to attend school.[10]

Some courts have relied upon *Yoder* absent any free exercise claim of the parents, which, not surprisingly, has led to disparate results. This has prompted some scholars to maintain that a secular equivalent of *Yoder* is needed and could be premised on a parental right to privacy.[11]

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[6]*Yoder*, 406 U.S. at 220-21.

[7]U.S. CONST. amend. I.

[8]*Yoder*, 406 U.S. at 214. *See also* Delconte v. State, 308 S.E.2d 898 (N.C. App. 1983), *rev'd on other grounds*, 329 S.E.2d 636 (N.C. 1985).

[9]San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973); Hanson v. Cushman, 490 F. Supp. 109, 114 (W.D. Mich. 1980); Scoma v. Chicago Board of Education, 391 F. Supp. 452, 461 (N.D. Ill. 1974). *But see* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). (In *Whisner*, the court suggested that the right of the parent to choose the means of educating the child was fundamental and not necessarily tied to a religious assertion.)

[10]*See supra* notes 8-9.

[11]Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLIAMETTE L. REV. 563 (1982); Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191 (1981). A similar argument, however, was recently rejected in a state court. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (1983).

If that premise were accepted, under standard constitutional analysis, the state would be required to demonstrate a compelling interest in compulsory attendance, regardless of the parents' reason for insisting on home education.

Not all defenses of home education have been based on free exercise rights. Another approach by parents that has met with some recent success in two state courts is the argument that statutes which prescribe criminal sanctions for parents who do not send their children to public or private schools are unconstitutionally vague because the statutes are unclear on whether education at home qualifies as private schooling.[12] It should be noted, however, that a number of states have categorically refused to recognize home education as private schooling, therefore placing the general viability of this argument in doubt.[13] Furthermore, the defense of unconstitutional vagueness could be nullified by legislative reaction.[14]

For the primary purposes of this Note, however, most discussion will be limited to those cases involving a parental assertion of free exercise rights to excuse noncompliance with compulsory attendance statutes. This was the assertion considered by the Supreme Court in *Wisconsin v. Yoder*, and because so much of the increase in home education today is attributable to the rise of religious fundamentalism, examination of this subject is particularly worthwhile.[15]

II. Background

Prior to *Wisconsin v. Yoder*, Amish parents had been generally unsuccessful in similar challenges to state compulsory education statutes.[16] The courts had relied on the "belief/action" distinction set out by the

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[12]Roemhild v. State, 251 Ga. 569, 308 S.E.2d 154 (1983); State v. Popanz, 112 Wis. 2d 166, 332 N.W.2d 750 (1983).

[13]Burrow v. State, 282 Ark. 479, 669 S.W.2d 441 (1984); *In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); F. & F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, 389 U.S. 51 (1967); State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963); City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).

[14]Indeed, the statutes of most states do not limit attendance to only public or private schools, but allow for "equivalent" education or schooling that meets certain prescribed standards. Therefore, this argument would not be available in many circumstances. *See supra* note 3.

[15]Furthermore, parents who choose to educate at home for non-religious reasons often are not in violation of statutes that allow non-institutional alternatives so long as certain standards (certification or subject requirements, for example) are met. In the free exercise context, however, parents often argue that they should not be bound by "equivalency" requirements. *See infra* notes 111-31 and accompanying text.

[16]State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, 389 U.S. 51 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

Supreme Court in *Cantwell v. Connecticut*[17] to find that two concepts were embraced in the constitutional right of religious liberty — freedom to believe and freedom to act — and that while the former freedom was absolute, the latter was subject to state regulation for the protection of society.[18] These courts held, therefore, that while the Amish were free to hold any belief they wished, the state could justifiably limit the right of the Amish to act on their beliefs and could require that their children attend school beyond eighth grade. This distinction was similarly employed to restrict the practices of parents of other faiths in removing their children from school or in providing education at home or in private schools that failed to conform to state-imposed standards.[19] These courts also relied on the concept of the state acting as *parens patriae*, or in the place of the parents.[20] In other words, the state could act to guard the general interest in the child's well-being, therefore giving the state power to limit parental freedom and authority in matters affecting a child's welfare.[21]

In 1972, however, the Supreme Court abandoned its belief/action distinction in the context of education. *Wisconsin v. Yoder* involved a situation not unlike those to which the belief/action distinction had earlier been applied. The Yoders were Old Order Amish who had been convicted under Wisconsin's compulsory education statute. They maintained that the established practice of their religion called for the children to leave school after eighth grade and to receive religious, agricultural, and domestic instruction at home. In finding the attendance statute unconstitutional as applied to these parents, the Supreme Court cited the long-established Amish tradition and the fear on the part of the parents that exposing the children to "worldly influences" in high school could result in Amish children leaving the faith and in the ultimate collapse of their religious order. In addition, the Court cited authority establishing firmly the right of the parents to direct the religious upbringing of their children in relation to education.[22]

The Court relied primarily on two cases which it found to articulate a constitutional parental right in this area: *Meyer v. Nebraska*[23] and *Pierce v. Society of Sisters*.[24] In *Meyer* the Court had struck down a state statute which prohibited the teaching of any language but English

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[17]310 U.S. 296 (1940).

[18]*Id.* at 303-04.

[19]Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955); People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (1950), *aff'd*, 278 A.D. 705, 103 N.Y.S.2d 757, *aff'd*, 302 N.Y. 857, 100 N.E.2d 48, *appeal dismissed*, 342 U.S. 884 (1951); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950).

[20]*See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).

[21]The state had also relied on this principle in *Yoder*, but the Court refused to extend it to that situation. 406 U.S. at 229-34.

[22]*Yoder*, 406 U.S. at 215-29. Not all courts have abandoned the belief/action distinction, however. *See* State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

[23]262 U.S. 390 (1923).

[24]268 U.S. 510 (1925).

prior to eighth grade. Among other things, the Court had said that the statute infringed on the rights of parents to engage a teacher to instruct their children in another language.[25] Additionally, *Pierce* had held unconstitutional an Oregon statute that required parents to send their children to public schools. The Court had found that the statute, by excluding the option of sending children to private schools, unreasonably interfered with the right of the parents in directing their children's upbringing.[26]

In *Yoder*, the Court also discussed at length the success enjoyed by the Amish in preparing children for the Amish way of life.[27] Indeed, the Court suggested that the state's interest in compelling attendance was satisfied by the instruction the Amish provided their children, a suggestion that had drawn a vociferous attack in the dissent to the state supreme court decision.[28] Nevertheless, the Court maintained that the question of whether an attendance statute is unconstitutional when applied to particular parents rests on a balancing test in which the free exercise of religion rights of the parents will be weighed against the state's interest in compulsory attendance.[29]

A concurring opinion written by Justice White and joined by Justices Brennan and Stewart recognized that some Amish children might choose not to continue in that way of life. Those Justices would have expanded the scope of the state's interest to include development of other talents or lifestyles that the child might choose.[30]

Justice Douglas, dissenting in part,[31] was more emphatic in stating that the child has a protectible right and interest wholly separate from that of the state or the parents.[32] Douglas proclaimed:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of

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[25]262 U.S. at 398.

[26]268 U.S. at 535. The actual holding in *Pierce* was not, however, premised on the parental right, but on the due process clause. The Court found that the Oregon statute was violative of due process because it would destroy the private schools' business. This distinction is significant because the Supreme Court later abandoned the due process clause as a means of overturning social and economic legislation. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Nevertheless, the Court continues generally to rely on *Pierce*, viewing it instead as an affirmation of parental rights. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 178 n.15 (1976).

[27]406 U.S. at 210-13.

[28]State v. Yoder, 49 Wis. 2d 430, 451, 182 N.W.2d 539, 549 (1971) (Heffernan, J., dissenting). The dissenting judge argued that the state's interest and obligation runs to every child, and that the court could not, therefore, abdicate the state's interest in even a few students. *Id.*

[29]406 U.S. at 220-21.

[30]*Id.* at 239-40 (White, J., concurring).

[31]*Id.* at 241 (Douglas, J., dissenting).

[32]*Id.* at 245-46.

> diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.[33]

III. Parents, Child, and State: the Competing Interests[34]

The majority, concurring, and dissenting opinions of *Yoder* demonstrate that there are three interests potentially involved in the home education question. The discussion that follows outlines these interests and shows how they sometimes can differ.

A. The Parental Right

First, it is significant to note that the early literature of the common law spoke of the legal *duties* of the parent to the child, rather than the *rights* of parents in directing their children's upbringing. Blackstone stated that the most important duty resting upon parents was to give their children "an education suitable to their station in life,"[35] but he also observed that "the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children."[36] Even *Meyer v. Nebraska*, upon which the Supreme Court relied in *Yoder* to establish the parental right to direct the child's upbringing, also spoke of the natural duty of the parent to provide a substantial education.[37] The shift in focus from parental duties to rights in the development of the common law is based primarily on the concept of the child as property.[38] Under the early common law, children had the status of paternal chattel. Children owed services to the father, just as households had owed services to the barons in feudal society.[39]

The emphasis on parental rights can also be seen outside the context of education or religion, most notably in those cases involving parental

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[33]*Id.* Douglas's dissent raises a number of questions regarding the child's right of self-determination, and implicit in his position is a value judgment on Amish tradition. Furthermore, all education, whether public, private, or at home, involves the instilling of values, but Douglas seems simply to have equated the values which the state would deem appropriate and the values the child would adopt if given the right of self-determination.

[34]This Heading is not interposed to suggest, of course, that these interests are always adverse.

[35]1 Commentaries 451 (T. Cooley ed. 1899).

[36]*Id.*

[37]262 U.S. at 400.

[38]*See generally* Watson, *The Children of Armageddon: Problems of Custody Following Divorce,* 21 Syracuse L. Rev. 55 (1969).

[39]*Id.*

consent or notice for a minor's abortion or use of birth control, where the Supreme Court has relied on the penumbral right to privacy.[40] It should be observed, however, that parental rights in this area are not absolute and may give way, at some point, to the interest of the state and to the liberty interest of the child.[41]

B. The Interests of the State and the Child

In addition to the interest of the parent, the *Yoder* balance recognized the interest of the state in mandating school attendance for the promotion of an effective citizenry and for the economic well-being of society.[42] Indeed, the assertion of a fundamental right by a parent may, in come circumstances, give way to this interest.[43] This state interest in education has been suggested to extend to both academic preparation and socialization.[44] In other words, the promotion of an effective citizenry and the economic well-being of society may call for the state to regard socialization of children as a legitimate aim of education. It has been pointed out, however, that if socialization is recognized as a legitimate state objective, then it cannot be accommodated by the proliferation of home education.[45] Therefore, parents seeking to educate their children at home may be given the additional burden of showing that their children are becoming well-adjusted socially, not just that they have mastered certain academic subjects. At the very least, this consideration would tip the balance heavily in favor of the state's interest when the *Yoder* test is employed.

It has been posited that recognition of the child's interest in the home education question is not necessary because consideration of the state's interest is sufficient to protect the interest of the child.[46] Given the broader scope of the state's interest articulated in Justice White's *Yoder* concurrence,[47] such a position might be tenable. For a number of reasons, however, the child's interest in the matter is distinguishable from that of the state.

First, the state's interest as described by the majority in *Yoder* is a collectivist[48] interest, one which may not protect all children in all

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[40]H.L. v. Matheson, 450 U.S. 398 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). These rights were premised on the privacy right found in Griswold v. Connecticut, 381 U.S. 479 (1965).

[41]H.L. v. Matheson, 450 U.S. 398 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

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

[43]*See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 162 (1944).

[44]*See generally* Note, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976) [hereinafter cited as Note, *Education and the Law*].

[45]*Id.* at 1391.

[46]*See* Stocklin-Enright, *supra* note 11, at 578.

[47]406 U.S. at 240 (White, J., concurring) (recognizing that individual children may choose another lifestyle).

[48]For an excellent exposition of the collective nature of the state's interest, see Note, *Education and the Law*, *supra* note 44. In brief, the state's interest extends to the general population, with the objective being the good of the society as a whole, and the good of the particular individual significant only insofar as it serves the general interest.

circumstances.[49] The Court, for example, failed to consider the "marginal" Amish child,[50] the one who would choose to leave the Amish community if given a real opportunity. In its analysis, the Court noted the *general* success enjoyed by the Amish; it did not focus on the best interests of a particular child. Second, because the *Yoder* balancing test recognizes only two parties in the balance, the state's ability to protect the interest of the child would decrease in proportion to the fervor of the parents' religious beliefs.[51] Third, a separate recognition of the child's interest is supported by the Supreme Court's conclusion that a child may be better protected by her own due process rights than by the state.[52]

C. *The Interests of the Child and the Parents*

Not only is the interest of the child distinguishable from the state interest, it is also distinct from that of the parents. While the common law created the presumption that a parent always acts in the child's best interest, that presumption is rebuttable.[53] A number of cases, particularly in the areas of institutional commitment of children, the right to withhold medical treatment, and parental notice or consent for a minor's abortion or use of birth control,[54] demonstrate judicial recognition of the difference that may develop between the interests of the parents and the child. In *Parham v. J.R.*, the Supreme Court found that, in a parent's decision to have a child committed to a mental institution, the child had a recognizable liberty interest which precluded absolute discretion on the part of the parents. The Court further declared that the importance of the decision warranted inquiry by a neutral factfinder to guarantee that the child's rights were not abridged.[55]

Additionally, parental rights have been curtailed for many years in such instances as the right to withhold medical treatment.[56] Developments in this area are particularly noteworthy in the home education context because, first, the parents often assert free exercise arguments,[57] and

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[49]*See generally* Note, *Education and the Law*, *supra* note 44.

[50]Knudsen, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1515 (1974).

[51]The irony is that it may be in these cases that the child's interest is in greatest need of protection. Parents who embark on home education primarily for academic reasons are more likely to be qualified to provide their children an equivalent or superior education. *See supra* note 15.

[52]*In re* Gault, 387 U.S. 1 (1967).

[53]Parham v. J.R., 442 U.S. 584, 602 (1979).

[54]*See supra* note 40.

[55]442 U.S. at 602.

[56]People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (1962); State v. Perricone, 37 N.J. 462, 181 A.2d 751 (1962). This issue has received increased attention recently as members of a few Christian fundamentalist sects withhold medical treatment from their children, sometimes resulting in criminal conviction.

[57]*See supra* notes 9-10 and accompanying text. These cases involved free exercise assertions.

second, there is evidence that these same parents are also beginning to remove their children from school.[58]

An older case involving a free exercise claim is significant in distinguishing the interests of the parent and child. In *Prince v. Massachusetts*,[59] the Supreme Court held that a guardian's free exercise claim would not outweigh the state's interest in enacting child labor laws in a situation where the child was selling religious literature (supplied by her guardian) on the street. The Court said, "Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children."[60] With that, the Court recognized that the interest of the child is not simply consumed by the religious assertion of the parent, even when the dangers are less tangible than those accompanying the withholding of medical treatment.

In a similar vein, the courts have recognized that the desires of the parents may not mirror the interests of the children in the context of education. This recognition has continued, even after *Wisconsin v. Yoder*, resulting in a more express recognition of the child's interest. Just two years following *Yoder*, the federal district court in *Davis v. Page*[61] maintained, "The interests of the children are not co-terminous with that of their parents. The children have conflicting interests."[62] In *Davis*, parents argued that their family's faith made it a sin to view audio-visual presentations, to study music, dance, or philosophy, or to receive guidance counseling at school. The parents sought to require school officials to excuse their children during such activities.[63] In denying the parents' petition, the district court concluded that allowing the children to leave during these activities would have an adverse effect on *their* education, and that a child's right to receive a proper education had to be weighed in the balance.[64]

The *Davis* court attempted to distinguish *Yoder* by pointing out that, unlike *Yoder*, elementary children were involved who would one day be expected to seek employment in the public sector.[65] The court, however, quoted at length from Justice Douglas's *Yoder* dissent,[66] which emphasized the child's rights. For this reason, it is difficult to maintain that the court did no more than distinguish *Yoder*. Furthermore, it is difficult to ascertain from the *Yoder* majority opinion how this alteration of facts should yield a different conclusion, because the simple balancing test does not clearly include recognition of these other factors.

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[58]News report, *The Today Show*, Sept. 25, 1984.
[59]321 U.S. 158 (1944).
[60]*Id.* at 170.
[61]385 F. Supp. 395 (D.N.H. 1974).
[62]*Id.* at 398.
[63]*Id.*
[64]*Id.* at 399-400.
[65]*Id.* at 400.
[66]*Id.* at 398.

In *Hanson v. Cushman*,[67] another federal district court distinguished the interest of the child. In so doing, the court noted Justice White's concurrence in *Yoder*: "*Pierce v. Society of Sisters* [citation omitted], lends no support to the contention that parents may replace state education requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."[68]

Another means by which a court has avoided the exclusion of the child's interest in the *Yoder* balance is illustrated in a 1983 state court decision. In *Delconte v. State*,[69] parents who had become associated with a fundamentalist Christian group argued that they believed the Bible commands parents to teach and train their children at home.[70] The North Carolina appeals court, however, refused to recognize this assertion as a free exercise claim but only as a philosophical or "sociopsychological" choice that did not merit first amendment protection.[71] Significantly, though, the Supreme Court of North Carolina recently reversed the court of appeals.[72] The supreme court determined that under North Carolina's compulsory attendance statute, the education provided at home by the parents constituted a "school."[73] It therefore did not address the question that had been considered by the lower court, i.e., whether the attendance statute violated the parents' free exercise rights.[74] Assuming, however, the continuing validity of the lower court's reasoning on the free exercise contention, its decision suggests that courts may circumvent *Yoder* by imposing very strict standards on what can be considered a free exercise claim.

Also in 1983, a federal appeals court arguably moved even further from a strict *Yoder* analysis. In *Duro v. District Attorney*,[75] a parent initiated an action against North Carolina, alleging that his religious beliefs were infringed by the state compulsory school attendance law. Peter Duro, a Pentecostal, had refused to enroll his five children in school, contending that exposing his children to others who did not share his religious beliefs would corrupt them. He was particularly concerned about what he termed the promotion of "secular humanism" and "the unisex movement where you can't tell the difference between boys and girls."[76]

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[67]490 F. Supp. 109 (W.D. Mich. 1980).

[68]*Id.* at 113.

[69]308 S.E.2d 898 (N.C. App. 1983), *rev'd on other grounds*, 329 S.E.2d 636 (N.C. 1985).

[70]*Id.* at 900.

[71]*Id.* at 904.

[72]329 S.E.2d 636 (N.C. 1985).

[73]*Id.* at 641.

[74]*Id.* at 638.

[75]Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984).

[76]*Id.* at 97.

The court did not question the sincerity of Duro's religious beliefs and gave no indication that it accorded his free exercise claim any less weight than that given the Amish parents in *Yoder*.[77] As in *Davis*, however, the court attempted to distinguish *Yoder* on the basis of its factual context.[78] More significantly, though, the court went beyond *Yoder* in three other ways. First, it took a more expansive view of the state's interest served by school attendance, a view which seems to incorporate the concerns expressed in Justice White's *Yoder* concurrence. It found that "the children's future well-being . . . tips [the balance] in favor of the state."[79] Second, the court appears to have placed the burden squarely on the parent to demonstrate, not only the validity of the free exercise assertion, but also that home education would entirely satisfy the compelling interest of the state.[80] Finally, the court explicitly stated that it was considering the interests of the children: "[W]e hold that the welfare of the children is paramount and that their future well-being mandates attendance at a public or non-public school."[81] The court also noted a section of the North Carolina state constitution which provides that "[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right."[82]

That the majority opened new avenues in its analysis is further demonstrated by the alarm expressed by the concurring judge who agreed with the result only on the basis of the factual distinctions from *Yoder*, but maintained that the majority opinion otherwise strayed too far from the *Yoder* balance.[83] The concurrence did not agree that the provision in the state constitution could be added to the scales in balancing first amendment rights.[84] Second, the judge found the inference that a court should consider the child's interest was in contradiction to the "delicate balance" between parental rights and state interests established in *Yoder*.[85] The majority's departure from *Yoder* has not escaped notice in the academic realm as well.[86]

IV. Constitutional Right to an Education

While *Duro* leaves unsettled the question of precisely what effect a state constitutional provision will have on the *Yoder* balance, a holding

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[77] *Id.*

[78] *Id.* at 98.

[79] *Id.*

[80] *Id.* at 99. The burden of proof question is an issue that has developed in this type of controversy. Where the burden lies — on the parents or on the state — may be determined by subtle differences in statutory language. *See* Lines, *supra* note 1, at 212-14.

[81] 712 F.2d at 99.

[82] N.C. Const. art. I, § 15.

[83] 712 F.2d at 99 (Sprouse, J., concurring).

[84] *Id.* at 100.

[85] *Id.*

[86] *See, e.g.*, Note, *Compulsory Education: Weak Justifications in the Aftermath of* Wisconsin v. Yoder, 62 N.C.L. Rev. 1167 (1984).

by the Supreme Court that a person has a federal constitutional right to an education would necessarily elevate the child's interest to a level that must be weighed in the balancing test. Such a conclusion is indicated by a line of cases which maintain that constitutional rights attach directly to children.[87]

In the landmark school desegregation case, *Brown v. Board of Education*,[88] the Supreme Court repeatedly emphasized the importance of education to the individual. In an oft-quoted passage the Court maintained:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[89]

In 1973, the Supreme Court had occasion to consider the precise question of whether a person has a constitutional right to an education in *San Antonio School District v. Rodriguez*,[90] a challenge to the means by which Texas public schools are funded. Despite the strong language in *Brown*, as well as other similar pronouncements the Court had made, it declined to recognize education as a fundamental right.[91] Strong dissents on that issue were registered by Justice Brennan and Justice Marshall. Brennan objected to the inference that a right can be deemed fundamental only if explicitly or implicitly guaranteed by the Constitution.[92] Marshall constructed an elaborate argument for the recognition of a fundamental right.[93] Along the lines suggested by Brennan, Marshall pointed out that the rights to procreate, vote in state elections, or appeal from criminal convictions are not found in the words of the Constitution but have nevertheless been recognized by the Court.[94] Both Justices argued that the close nexus between express constitutional guarantees and education justifies the recognition of a fundamental right to an education, given

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[87]Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School District, 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).

[88]347 U.S. 483 (1954).

[89]*Id.* at 493.

[90]411 U.S. 1 (1973).

[91]*Id.* at 30.

[92]*Id.* at 62 (Brennan, J., dissenting).

[93]*Id.* at 70 (Marshall, J., dissenting).

[94]*Id.* at 100.

that education is "inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[95] In other words, the Justices would have recognized a penumbral right to an education as the Court had recognized a penumbral right to privacy.[96]

The refusal in *San Antonio* to recognize the right to an education is also difficult to reconcile with subsequent Supreme Court decisions. For example, in *Goss v. Lopez*,[97] the Court held that students suspended from school for more than a few days have a due process right to a hearing. Moreover, the Court maintained that students facing suspension have a protected property interest in education.[98] Hence, it is difficult to reconcile Court decisions which maintain that a person has no fundamental right to an education with other decisions which recognize the potential for education as a protectible property interest.

Most notably, the Supreme Court has recently decided that the undocumented children of illegal aliens have the right to a public education. In *Plyler v. Doe*,[99] the Court acknowledged its *San Antonio* conclusion but went on to decide, on an equal protection basis, that children of illegal aliens do have the right to an education.[100] In defending this right the Court emphasized the importance of education both to the society and to the individual:

> Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . In sum, education has a fundamental role in maintaining the fabric of our society. . . .
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> . . . Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost . . . of . . . denial . . . with the framework of equality embodied in the Equal Protection Clause.[101]

Arguably, *Plyler v. Doe* can be reconciled with *San Antonio*. The plaintiffs in *Plyler* were faced with *complete* deprivation of educational benefits, not just unequal and inadequate funding resulting from the system challenged in *San Antonio*. Moreover, the *Plyler* opinion did not

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[95]*Id.* at 63 (Brennan, J., dissenting).

[96]Griswold v. Connecticut, 381 U.S. 479 (1965).

[97]419 U.S. 565 (1975). Unlike *San Antonio*, which was decided on an equal protection basis, *Goss* was decided on procedural due process grounds.

[98]*Id.* at 579.

[99]457 U.S. 202 (1982).

[100]*Id.* at 221.

[101]*Id.* at 221-22.

directly contradict *San Antonio* by explicitly subjecting the state policy to the strict scrutiny that would have been warranted had the child's interest in education been deemed fundamental. Instead, the Court declared that it was employing only the rational basis test and that the statutory policy could not even withstand that scrutiny.[102] That assertion, however, is rather difficult to support. The school district had contended that the state has an interest in preserving the state's limited resources for the education of its lawful inhabitants and in deterring the influx of illegal aliens.[103] The Court actually appears to have subjected the state policy to a greater level of scrutiny, suggesting that it accorded more weight to the child's interest in education than the constraints imposed by *San Antonio* would allow.

At the very least, *Plyler v. Doe* reflects the movement away from a focus on parental rights to those of the child. It also strengthens the assertions by Justices Brennan and Marshall in their *San Antonio* dissents that education is a fundamental right by elevating the importance of education through the nexus argument. Furthermore, the Court's position in *Plyler v. Doe* that the child's interest will not be extinguished by the status or wrongdoing of the parent is difficult to reconcile with the principles reflected in the *Yoder* balancing test. In the *Yoder* balance, the state's ability to protect the interest of the child is decreased by a free exercise claim of the parents. In other words, the interest or right of the child is linked inversely to the right of the parent. This conflict is yet another example of the inequity of a strict *Yoder* balance and of the tendency of the courts to consider the interest of the child in education, irrespective of the interests or rights of parents or the state.

V. Vindication of the Child's Interest

In sum, the survey of these cases decided since *Wisconsin v. Yoder* shows that the courts have had difficulty in applying the *Yoder* balance or have simply circumvented it. This has led some to conclude that *Yoder* has had little actual impact.[104] Some courts have confined *Yoder* very strictly to its facts, readily distinguishing it from other home education situations. They have seemed not to follow its holding where the parents' religion offered anything less than a total social, religious, and economic way of life to the child so that there was little danger of future disenfranchisement or unemployment.[105] In these cases, there are few religious assertions that would weigh more heavily than the state's interest. The problem with this analysis, however, is that it provides little or no guidance for future controversies. Other courts have taken a more expansive view of the state's interest, incorporating concerns for

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[102] *Id.* at 224-30.

[103] *Id.* at 227-28.

[104] *See, e.g.*, Note, *Parental Rights: Educational Alternatives and Curriculum Control*, 36 Wash. & Lee L. Rev. 277, 284 (1979).

[105] *Id. See also* Note, *Education and the Law*, *supra* note 44, at 1398.

the child's future well-being and ability to pursue ways of life other than those dictated by the parents' faith.[106] Another means by which a court has eased the effect of *Yoder* on the child is by viewing the parents' religious motivation as something less than a free exercise claim that would trigger strict scrutiny of the compulsory attendance statute.[107] The trend indicated by *Duro* is a more explicit recognition of the child's interest and most clearly appears to be on a collision course with *Yoder.*[108] At some point, the Supreme Court will have to speak to this issue and present some clearer guidelines to which courts can more justifiably adhere in home education controversies.

Given the willingness of the courts to consider the interests of the child, or perhaps given the recognition that the child has a protectible interest in the controversy, a number of questions arise in regard to how the interest of the child might be vindicated. One solution to this problem is presented by statutes which allow home education but prescribe certain standards which the instruction must satisfy.[109] A related suggestion is that home education be supervised by state officials[110] or that the students' progress be monitored by competency testing.[111] These alternatives, however, raise significant problems, both practical and theoretical.

The most obvious practical problem with these suggestions is the enormous burden they would place on state officials. The state would be forced to monitor far more educational units,[112] thereby increasing the existing administrative and financial hardships on the public school systems. Indeed, the choice of parents to educate their children at home has been denied merely on the ground of administrative inconvenience.[113] Competency testing of students taught at home would probably present fewer administrative and economic difficulties for the state, but it also raises some problems.[114]

The most hotly-debated issues raised by these suggestions are constitutional in nature. All state compulsory attendance statutes allow the

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[106]*See supra* notes 67-68 and accompanying text.

[107]*See supra* notes 69-71 and accompanying text.

[108]*See supra* notes 75-85 and accompanying text.

[109]Note that many statutes do just that by providing for non-school alternatives that provide an "equivalent" education. *See supra* note 14 and accompanying text.

[110]*See* Stockin-Enright, *supra* note 11, at 582, 587.

[111]Indiana's former state superintendent of public instruction made such a suggestion in regard to students attending private schools. That suggestion led to a vociferous attack by the president of a fundamentalist schools association. Indianapolis Star, September 23, 1984, at 7F, col. 1.

[112]Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191, 197 (1981). *See also* Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353 (1980).

[113]Board of Education v. Allen, 392 U.S. 236 (1968).

[114]*See supra* note 111 and text accompanying *infra* note 130.

option of private schooling[115] and most also allow for home education under certain circumstances.[116] In both cases, however, the states have imposed various regulations on the non-public school alternatives. These regulations typically focus on the required minimum number of days in school per year, qualifications of teachers, coverage of certain subjects, and specifications for facilities.

This regulation of non-public school alternatives has met vigorous opposition by various religious groups maintaining parochial schools or conducting home education, on the grounds that state regulation results in excessive government entanglement with religion and infringement on their free exercise rights.[117] In the main, these challenges have not been successful.[118] For example, a number of well-publicized cases have arisen in Nebraska in recent years. In 1981, a church operating a non-approved school challenged the state's right to impose standards on the school, particularly the requirement that the teachers be certified. The Nebraska Supreme Court upheld the state's authority.[119] A related case gained nationwide attention when the leader of the church school was imprisoned and the school doors padlocked by state officials.[120] Nebraska courts have, nevertheless, continued to maintain the position that state standards must be upheld.[121] The Nebraska courts have also applied this finding in the context of home education.[122]

Similarly, a Michigan court has upheld a statute imposing teacher certification requirements on parochial schools, finding that the state has a proper and compelling interest in the regulation of private education.[123]

On the other hand, there has been some indication that as the fundamentalist movement has grown, become more vocal, and wielded more influence, some courts have become more responsive to this type of challenge. Maine's federal district court, for example, has been more sympathetic to the arguments of the fundamentalist schools.[124] In *Bangor Baptist Church v. Maine Dept. of Education,*[125] the state charged the school, pursuant to the compulsory attendance statute, with inducing

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[115]This, of course, was mandated by the decision in *Pierce v. Society of Sisters*. *See supra* note 26 and accompanying text.

[116]*See supra* note 3.

[117]*See, e.g.*, State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

[118]*See infra* notes 119-22 and accompanying text.

[119]State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed*, 454 U.S. 803 (1981).

[120]Sileven v. Tesch, 212 Neb. 880, 326 N.W.2d 850 (1982).

[121]State *ex rel.* Kandt v. North Platte Baptist, 216 Neb. 684, 345 N.W.2d 19 (1984).

[122]State *ex rel.* Douglas v. Bigelow, 214 Neb. 464, 334 N.W.2d 444 (1983).

[123]Sheridan Road Baptist Church v. Department of Education, 132 Mich. App. 1, 348 N.W.2d 263 (1984). *See also* State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983).

[124]These cases too have received much notoriety. The controversy was the subject of a segment on the program "60 Minutes" on September 30, 1984.

[125]576 F. Supp. 1299 (D. Maine 1983).

truancy. The court ruled that the statute could not be used to prevent an unapproved school from operating and therefore denied the injunction the state had sought.[126]

In an Arkansas federal court, an association of private but non-church affiliated day care centers challenged a state statute that exempted similar church-run day care centers from certain regulations that were imposed on non-parochial day-care centers.[127] The defendants argued that state regulation that might arguably relate to subject matter and means of instruction would amount to infringement on free exercise of religion.[128] The district court upheld the constitutionality of the statute,[129] thereby allowing the statute to impose more regulation on secular centers than on religious centers.

The significance of these developments in the realm of home education is that any requirements states attempt to place on home education, as they have on private schools, are subject to similar attack. The right of the state to monitor home education activities, particularly by means relating to teacher certification and subject matter, is vulnerable to this challenge.[130] In fact, the monitoring of home education would probably be viewed as more intrusive than state regulation of private schools.

Because any regulation of home education can be challenged on these grounds, the solution lies in a recognition of the child's interest in the home education conflict, thereby allowing a court to consider the child's interests as well as the parents' free exercise rights. At this point it is useful to return to *Yoder*. The *Yoder* majority did not absolutely rule out consideration of the child's interest in all circumstances, but it relied on technical standing grounds to maintain that the child's interest was not at issue.[131] In other words, the *Yoder* majority would have forced the child to hire her own attorney independently and bring her own action. Such a requirement is far from realistic and, beyond that, undermines the family integrity and harmony that the majority claimed to secure.[132] This position also ignores the fact that many children in this circumstance are quite young and are unable to protect their own educational interests.

Neither does Justice Douglas's dissent offer a satisfactory answer. While he argued that the child's interest should be considered, the means through which the court was to do so was to solicit the child's opinion

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[126]*Id.* at 1314.

[127]Arkansas Day Care Ass'n, Inc. v. Clinton, 577 F. Supp. 388 (E.D. Ark. 1983).

[128]*Id.* at 396.

[129]*Id.* at 398.

[130]Note that a similar challenge would not be available to parents or schools not asserting a free exercise claim.

[131]406 U.S. at 230-31.

[132]For a general discussion of the need to protect family privacy and harmony in this area, see Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605.

and give weight to her preference.[133] This alternative has most of the weaknesses of the majority position. Furthermore, it fails to distinguish between the child's *preference* and the child's *interest*. Using child custody cases as an analogy, a child's preference is normally solicited but is not usually the sole criterion by which a custody decision is made.[134] Instead, preference simply becomes part of the court's inquiry in achieving the best interests of the child.[135]

The analogy to custody decisions is useful as a means of vindicating the child's interest in the home education question. The "best interests of the child" inquiry should be employed by courts when parents seek to assert free exercise claims in order to excuse compliance with state compulsory attendance statutes. A number of practical questions remain regarding how a court should determine a child's best interests, including how much weight to accord the child's preference and whether separate representation of the child is necessary.[136] Nevertheless, an approach based on a consideration of the child is warranted in the home education question, even in the free exercise context, and can best be effectuated by an inquiry into the child's best interests.

Again, it is important to recognize that litigation of this matter arises only in a limited number of circumstances.[137] The contention, then, that the child's interest should be considered in a judicial proceeding does not, of itself, entail a massive amount of extra litigation. Instead, it simply adds another dimension to an already-existing inquiry.

VI. Conclusion

The growth of home education can be viewed, in many circumstances, as a positive development. It reflects the public concern about the quality of education. It is also indicative of parental participation in the education process, something educators have been linking for years to student performance.[138] In some cases, however, parents' motives for home education may be primarily religious and leave other educational objectives in a secondary position. It is incongruous and unfair that a child may be deprived of standards the state legislature has deemed

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[133]406 U.S. at 241-43 (Douglas, J., dissenting).

[134]The child's preference is normally given varying weight depending on the age and maturity of the child.

[135]*See generally* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (Summer 1975) for an explanation of the "best interests of the child" inquiry.

[136]For an exposition of the view that children should have mandatory representation through a guardian *ad litem* system, see Note, *"Mom, Dad, I Want to Introduce My Lawyer." The Development of Child Advocacy in Family Law*, 29 S.D.L. Rev. 98 (1984). An analogy might also be made to Parham v. J.R., 442 U.S. at 602, which provides for a neutral factfinder to protect the child's interest.

[137]*See supra* note 3.

[138]*See, e.g.*, A. Coletta, Working Together: A Guide to Parent Involvement (1977).

necessary for quality education simply on the basis of her parents' religious assertions, without any inquiry into the child's interest.

The cases decided since *Wisconsin v. Yoder* illustrate the incompleteness and unfairness of a balancing test that ignores the child's interest in the matter. They also illustrate the ways the courts have attempted to consider the child. However, as the growth of home education spawns more controversy, and probably more litigation, a more clearly-enunciated test that incorporates the interest of the child should be formulated.

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