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# PEOPLE v. BENNETT: ARE TEACHER CERTIFICATION REQUIREMENTS FOR SECULAR HOME EDUCATORS CONSTITUTIONAL?

## I. INTRODUCTION

The number of United States families educating their children at home increased at least eight fold between the early 1970s and 1987.[1] It is possible that as many as one million children are educated at home in this country.[2] Families have turned to the practice of home education primarily for religious reasons.[3] However, others home school their children out of concern for the quality of instruction,[4] curriculum,[5] and textbooks[6] in the public schools and the values

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1. Patricia M. Lines, *An Overview of Home Instruction*, 68 PHI DELTA KAPPAN 510 (1987).

2. J. Michael Smith & Christopher J. Klicka, *Review of Ohio Law Regarding Home Education*, 14 OHIO N.U. L. REV. 301, 302 (1987).

3. *See* Lines, *supra* note 1, at 510 ("[T]he largest growth in home-schooling appears to be among devout Christian parents who are unhappy with the secular nature of the public schools and have not found a suitable religious school.").

4. *See, e.g.*, Bob Pike, *Why I Teach My Children at Home*, 73 PHI DELTA KAPPAN 564 (1992); *see also* NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1982), *reprinted in* 129 CONG. REC. 11227, 11231 (1983) [hereinafter NATION AT RISK]. In NATION AT RISK, the National Commission on Excellence in Education stated, "Too many teachers are being drawn from the bottom quarter of graduating high school and college students . . . . Half of the newly employed mathematics, science, and English teachers are not qualified to teach these subjects." *Id.*

5. *See* NATION AT RISK, *supra* note 4, at 11230 ("Secondary school curricula have been homogenized, diluted, and diffused to the point that they no longer have a central purpose."). The report emphasized the lack of requirements mandating "academic" courses such as calculus and geography. *Id.*

6. NATION AT RISK, *supra* note 4, at 11231. "During the past decade or so a large number of texts have been 'written down' by their publishers to ever-lower reading levels . . . . [A] majority of students were able to master 80 percent of the material in some of their subject-matter texts before they had even opened the books." *Id.*

taught in those schools.[7] Parents have also asserted numerous other reasons.[8] Subject to some restrictions, most states' compulsory education statutes explicitly allow parents who do not hold state approved teaching certificates to educate their children at home.[9] Other state statutes, while not specifically addressing home education, may be interpreted to allow the practice.[10] The rigor of the restrictions imposed upon home educators varies by jurisdiction.[11] The requirement that home educators be certified to the same extent as teachers in the public schools represents the most onerous requirement.[12] As of this writing, Michigan is one of a small number of states with such a requirement.[13]

The Michigan Legislature has not specifically addressed home education. However, the Michigan Department of Education has determined that home education is governed by statutes governing

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7. *See, e.g.*, Pike, *supra* note 4, at 564 ("Discipline has become a dirty word [in the public schools], but we think of it as a positive concept . . . . "); Lines, *supra* note 1, at 510 ("Some parents object to the political or cultural values they find in public or private schools.").

8. David D. Williams, Understanding Home Education: Case Studies of Home Schools, Presented at the Annual Meeting of the American Educational Research Association (April 23-27, 1984), *microformed in* ERIC, No. ED 244 392 ("child seems unsuited for school," "control" of parents over children, ideas about curriculum content).

9. Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REF. 733, 748 (1990).

10. *Id.* at 746-47.

11. See *infra* notes 35-39 and accompanying text for restrictions imposed by other states.

12. Dorman, *supra* note 9, at 756-58. Public school teacher certification requires "[a] bachelor's degree from an approved teacher-education college, with at least 180 hours of supervised student teaching . . . . Tuition, materials, and transportation costs loom large . . . . [The time commitment] would be time away from the very children the parent wishes to educate at home." *Id.* at 758.

13. For the Michigan rule, see *infra* notes 14-16 and accompanying text. The other states include California and Alabama, People v. DeJonge, 501 N.W.2d 127, 141 n.49 (Mich. 1993) and Iowa, IOWA CODE ANN. §§ 299.1, 299A.2 (West 1988 & Supp 1995.).

private schools.[14] Michigan's compulsory education statute dictates that a child does not need to attend public school if that child "is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade."[15] A state approved school is a school in which the teachers are certified.[16] Certification is a very heavy burden for a home educator, who is usually a parent.[17] Therefore, the requirement has been challenged in a number of Michigan cases involving home educators and private schools.[18]

In *People v. DeJonge*,[19] the Michigan Supreme Court determined that Michigan's compulsory education statute could not prevent parents asserting their right to the free exercise of religion from home educating their children.[20] However, in *People v. Bennett*,[21] decided at the same time as *DeJonge*, the court would not afford such protection to parents who educated their children at home for secular reasons.[22] In *Bennett*, the parents asserted that the statute

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14. People v. Bennett, 501 N.W.2d 106, 109 n.7 (Mich. 1993). The document referred to by the court, entitled "Education of the Child in the Parental Home," currently exists only as an appendix to a memorandum to the State Board of Education from its chairman. Memorandum from Phillip E. Runkel to the State Board of Education (Mar. 21, 1986) (on file with the Michigan Department of Education). This memo is based upon an opinion by Attorney General Frank J. Kelley, Opinion 5579: Schools and School Districts: Education of Child in Parental Home, in which Mr. Kelley stated, "a parent may not provide for his or her child's education at home without having a certified teacher [present]." 1979-80 Op. Att'y Gen. 416, 418-19 (1979).

15. MICH. COMP. LAWS ANN. § 380.1561(3)(a) (West 1988).

16. *See supra* notes 12-13 and accompanying text.

17. *See supra* note 12.

18. Clonlara v. Runkel, 722 F. Supp. 1442 (E.D. Mich. 1989); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); People v. Bennett, 501 N.W.2d 106 (Mich. 1993); Clonlara v. State Bd. of Educ., 501 N.W.2d 88 (Mich. 1993); Sheridan Rd. Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986).

19. 501 N.W.2d 127 (Mich. 1993).

20. *Id.* at 129.

21. 501 N.W.2d 106 (Mich. 1993).

22. *Id.* at 107-08.

violated their Fourteenth Amendment fundamental "right to direct the education of their children."[23] The court denied relief, stating that the plaintiffs were incorrect in contending that it was "beyond a state's authority to interfere with parents' choice of private education for their children,"[24] because no such unrestricted right to control a child's secular education existed.[25]

This Note argues that *Bennett* was decided incorrectly. In a number of cases, the United States Supreme Court has recognized that an essential or fundamental right exists for parents to direct the upbringing and education of their children.[26] The Supreme Court's decisions indicate that this parental right is applicable to a wide variety of situations involving the education and upbringing of children and is broad enough to encompass the practice of home schooling.[27] Although the right is subject to "reasonable regulation," the teacher certification requirement does not qualify as a "reasonable" regulation because of the heavy burden it places on those attempting to exercise the parental right.[28] Thus, the Michigan Supreme Court should have allowed the Bennetts to assert the right to home school. When a state statute or regulation significantly infringes a fundamental right, United States Supreme Court decisions indicate that courts should strictly scrutinize the rule.[29] In using this analysis, the deciding court must confirm that the rule is both essential to achieving a compelling state interest and "narrowly tailored" to achieve that interest.[30] Because the Michigan statute infringed the parental right asserted by the Bennetts, the court should have applied a strict scrutiny analysis. The certification requirement as applied is not essential to achieving a compelling state

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23. *Id.* at 110. The Bennetts relied on Pierce v. Society of Sisters, 268 U.S. 510 (1925). 501 N.W.2d at 112-15.

24. 501 N.W.2d at 112.

25. *Id.* at 112-15.

26. *See infra* notes 196-202 and accompanying text.

27. *See infra* notes 151-74 and accompanying text.

28. *See infra* note 204.

29. *See, e.g.*, San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-40 (1972) (discussing application of strict scrutiny).

30. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

interest, and thus fails this test.[31]

## II. BACKGROUND

Although virtually all states regulate the education of minors to some extent, onerous requirements are rare.[32] Short of banning home education altogether, the most burdensome requirement that states currently impose is the teacher certification requirement.[33] The questionable value of this requirement is reflected in the fact that most states that have enacted such statutes later repealed them.[34] Instead, these states rely upon a variety of less onerous methods to achieve their interest in ensuring an educated populace. These include standards that govern teacher competence,[35] subjects taught,[36] hours of education,[37] and periodic assessment of students using standardized tests.[38] Other states require the program used to be pre-approved by a representative of the school system.[39] Unlike the certification requirement, none of these methods effectively eliminate home education as an option for most parents. Michigan is one of a handful of states that still has this requirement for home educators, and even in Michigan only certain groups are subject to the rule.[40] In the home education context, those who fail to meet some or all of these requirements are subjected to the loss of the right

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31. *See infra* notes 206-16 and accompanying text.

32. *See, e.g.*, People v. Bennett, 501 N.W.2d 106, 125, n.13 (Riley, J., dissenting in part).

33. *Id.*; *see also supra* notes 11-13 and accompanying text.

34. People v. DeJonge, 501 N.W.2d 127, 141 (Mich. 1993).

35. *See, e.g.*, MINN. STAT. ANN. § 120.101(7)(5) (West 1993).

36. *See, e.g.*, IND. CODE ANN. § 20-8.1-3-34 (West 1995) ("instruction equivalent to that given in the public schools").

37. *See, e.g.*, W. VA. CODE § 18-8-1 (Michie Supp. 1994) (exception B requires instruction "for a time equal to the school term of the county" where the student resides).

38. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-802(B)(1) (West 1991 & Supp. 1994).

39. *See, e.g.*, MASS. ANN. LAWS ch. 76 § 1 (Law. Co-op. 1991).

40. 501 N.W.2d at 142 (nonpublic schools), 144 (*DeJonge* holding).

to home school, the imposition of fines, or imprisonment.[41] Litigation frequently occurs when a fairly onerous requirement imposed on a home educator by a state statute or regulation is not met, resulting in action by the Board of Education or other state agency.[42]

Parents have challenged on a number of grounds statutes and regulations that heavily burden home educators. Home educators have argued that the governing statute is void for vagueness,[43] that petitions for exemption from the regulation or statute be reviewed by a neutral and detached arbitrator,[44] and frequently, that the statute is unconstitutional on substantive due process grounds. Those asserting substantive due process rights rely either on the Free Exercise of Religion Clause of the First Amendment, as applied to the states through the Fourteenth Amendment,[45] or on a liberty interest inherent in the Fourteenth Amendment itself.[46] Free exercise claims may be accompanied by claims relying on the "inherent" Fourteenth Amendment right to direct the education and upbringing of one's children.[47] The Fourteenth Amendment dictates that "no State shall deprive any person of life, liberty, or property, without due process of law."[48] Courts have interpreted the Fourteenth Amendment to "incorporate" most of the provisions of the Bill of

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41. The parents in People v. DeJonge, 501 N.W.2d 127, were originally "sentenced to two years probation, . . . fined $200, required to test their children for academic achievement, and ordered to arrange for certified instruction" for violations of MICH. COMP. LAWS ANN. § 380.1561(1), (3) (West 1988), and § 388.553 (West 1988). *DeJonge*, 501 N.W.2d at 130. The Bennetts, who had committed similar offenses, were fined a total of $200 and forced to arrange for placement testing and for teaching by certified teachers. *Bennett*, 501 N.W.2d at 110.

42. This was the case in both *Bennett* and *DeJonge*.

43. Roemhild v. State, 308 S.E.2d 154 (Ga. 1983).

44. Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985), *rev'd in part*, 815 F.2d 485 (8th Cir. 1987).

45. *See, e.g.*, *DeJonge*, 501 N.W.2d at 129-31.

46. *See, e.g.*, *Bennett*, 501 N.W.2d at 108.

47. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

48. U.S. CONST. amend. XIV, § 2.

Rights.[49] In addition to those explicit guarantees of liberty, the Supreme Court has held that a number of "fundamental rights" exist that are protected by the Fourteenth Amendment, or can be found in the "penumbras" of the Bill of Rights.[50] The United States Supreme Court has described fundamental rights as "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[51] Parents asserting such rights in home education cases rely on several United States Supreme Court cases.

*A. United States Supreme Court Cases*

The first of three early cases recognizing a right to direct the education of one's children was *Meyer v. Nebraska*,[52] in which a private school teacher challenged a state law forbidding private school teachers from teaching foreign languages to any child below the eighth grade.[53] Justice McReynolds stated that the Fourteenth Amendment guarantee of liberty encompassed the right of a person "to engage in any of the common occupations of life, . . . bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized

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49. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment guarantee against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Fiske v. Kansas, 274 U.S. 380 (1927) (First Amendment right to free speech).

50. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1922). "[R]ight[s] to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience" are all protected by the Fourteenth Amendment. For an example of rights derived from 'penumbras' of the Bill of Rights, see Griswold v. Connecticut, 381 U.S. 479 (1964), in which Justice Blackmun maintains that a general right of privacy, derived from the 'penumbras' of the First, Third, Fourth, Fifth, and Ninth Amendments, protects (1) freedom of association; (2) the right to educate a child where one chooses; (3) the right to distribute and receive such literature as one wishes; and (4) those rights of privacy having to do with the marital relationship. *Id.* at 482-85.

51. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

52. 262 U.S. 390 (1923).

53. *Id.* at 397.

at common law as essential to the orderly pursuit of happiness by free men."[54] The Court held the right of the teacher to instruct the children attending the school and the right of the parents to control their children's education to be within the scope of the amendment and referred to these as "certain fundamental rights that must be respected."[55] However, the Court recognized that states did have the power to make reasonable regulations governing operation of schools.[56] The Nebraska statute went beyond this. Therefore, the statute "as applied [was] arbitrary and without reasonable relation to any end within the competency of the state."[57] Because of this, it violated the Fourteenth Amendment.

*Meyer* was followed by *Pierce v. Society of Sisters.*[58] In *Pierce*, a religious school challenged an Oregon statute requiring guardians of children to send those children to the public schools during the school year.[59] The Court applied *Meyer* and found that the act "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[60] The state could not "standardize its children by forcing them to accept instruction from public school teachers only."[61] The Court acknowledged the fact that a proper exercise of police power by the state could not be challenged, but noted that the religious school here had challenged an improper use of such power.[62] The term "improper use" encompassed arbitrary or unreasonable interference with the operations of the school by the state.[63]

In *Farrington v. Tokushige*,[64] the plaintiffs challenged an act passed by the Hawaii territorial legislature placing numerous restrictions on

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54. *Id.* at 399.
55. *Id.* at 400.
56. *Id.* at 402.
57. *Id.* at 403.
58. 268 U.S. 510 (1925).
59. *Id.* at 530.
60. *Id.* at 534-35.
61. *Id.* at 535.
62. *Id.* at 535-36.
63. *Id.*
64. 273 U.S. 284 (1927).

private schools that gave instruction in foreign languages. Restrictions included licensing fees, the mandatory submission of lists of student names and addresses, stringent limitations on hours of teaching, designation of textbooks (all of which had to be written in English), and inspection requirements.[65] The Court held that this statute violated the Fifth Amendment.[66] The measures adopted gave "affirmative direction concerning the intimate and essential details of such schools . . . and den[ied] . . . patrons reasonable choice and discretion in respect of teachers, curriculum and text-books."[67] Enforcement of the measures "would deprive parents of . . . instruction they think is important and we [the Court] cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions."[68]

It is noteworthy that all three of these cases contain language characteristic of both the "strict scrutiny" and "minimal scrutiny" or "rational basis" tests as courts use them today in examining state actions that interfere with, respectively, persons asserting fundamental rights (or, in some circumstances, who are members of a "suspect class"), and those challenging state actions without asserting fundamental rights (and who are not members of a "suspect class").[69]

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65. *Id.* at 291-98.

66. *Id.* at 299. A territorial legislature is considered an agent of the Federal government. *Id.* at 285. Because of this, the Fifth, rather than the Fourteenth, Amendment applied. *Id.* at 299.

67. *Id.* at 298.

68. *Id.*

69. For instance, the court in *Bennett* found that the plaintiffs had failed to assert any fundamental right, and so applied minimal scrutiny. 501 N.W.2d at 115-16. This, according to the court, required that the party challenging the state action prove the action is not "reasonably related to a legitimate state interest." *Id.* at 116. This resembles language in *Meyer* indicating that the statute challenged in that case was "without reasonable relation to some purpose within the competency of the state to effect." Meyer v. Nebraska, 262 U.S. 390, 400 (1923). On the other hand, the *Meyer* Court referred to the parental right of control over one's children as one of "certain fundamental rights which must be respected." *Id.* at 401.

Numerous recent cases have confirmed the existence of a parental right to control a child's upbringing and have applied it to situations outside the private school context. Many cases recognizing or relying on the right have used it in conjunction with other rights, such as the right to free exercise of religion or to free speech. For instance, in *Prince v. Massachusetts*,[70] a child sold religious literature at her mother's request in violation of a state statute.[71] After the mother asserted the parental right, the Court referred to both freedom of religion and the parental rights inherent in the Fourteenth Amendment as "sacred private interests."[72] According to the Court, custody, care, and nurture of a child were part of a private realm of family life the state could not enter under most circumstances.[73] In *Griswold v. Connecticut*,[74] the Court, in dictum, "reaffirm[ed] the principle of the *Pierce* and the *Meyer* cases" and indicated that the rights described therein were protected by the right to free speech guaranteed by the First Amendment, as well as by the liberty interest inherent in the Fourteenth Amendment itself.[75]

Other cases have concentrated exclusively on a broad parental right to direct the education and upbringing of children, or upon this right in association with closely related rights (e.g., to the integrity of the family unit). In *Parham v. J.R.*,[76] parents successfully asserted such a right when committing their child to a mental institution,[77] and in *Stanley v. Illinois*,[78] which addressed an unwed father's right to care for his children after their mother's death, the Court cited *Meyer* for the proposition that "[t]he rights to conceive and to raise one's children have been deemed 'essential.'"[79]

The Court addressed the parental right as it relates to home

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70. 321 U.S. 158 (1944).
71. *Id.* at 159-61.
72. *Id.* at 165.
73. *Id.* at 166.
74. 381 U.S. 479 (1965).
75. *Id.* at 483.
76. 442 U.S. 584 (1979).
77. *Id.* at 602-03.
78. 405 U.S. 645 (1972).
79. *Id.* at 651.

education for religious reasons in *Wisconsin v. Yoder*.[80] In *Yoder*, Amish citizens challenged a compulsory school attendance law,[81] stating that they believed such education beyond the eighth grade to be "contrary to the Amish religion," and that they could provide "informal vocational education" to their children at home that would better meet the needs of their rural lifestyle.[82] Citing *Pierce*, the Court acknowledged the power and responsibility of the state to "impose reasonable regulations for the control and duration of basic education,"[83] but noted that this power would be subjected to more than a "reasonable relationship" test when it interfered with "parental direction of the religious upbringing and education of their children."[84] The Court recognized a state's interest in universal compulsory education, but indicated that only when this interest was of a magnitude sufficient to outweigh the right derived from the Free Exercise Clause could it be allowed to dictate whether a parent could educate her child at home.[85] The state interest was not of sufficient weight in this case, and the Court exempted the Amish from the law.[86] In reaching this decision, the Court explicitly stated that purely secular considerations would not have allowed the parents to assert Free Exercise rights, and that the Court gave no weight to secular considerations in determining whether the Free Exercise Clause was violated in this case.[87] Thus, despite the fact that the

80. 406 U.S. 205 (1972).

81. *Id.* at 207-12.

82. *Id.* at 209.

83. *Id.* at 213.

84. *Id.* at 232-33.

85. *Id.* at 233-34.

86. *Id.* at 234.

87. *Id.* at 215-16. Despite this language, in Employment Div. v. Smith, 494 U.S. 872 (1990), the Court indicated that strict scrutiny was only applied in *Yoder* because the Free Exercise clause existed in combination with the parental right. *Id.* at 881. In *Smith*, the Court held that when a criminal law that is not targeted to a particular religious practice infringes one's right to free exercise of religion, the Court will not subject the law to strict scrutiny unless the free exercise right is combined with some other constitutionally protected right. *Id.* at 881-83. This may or may not have implications for those parents home educating their children for secular reasons. *See infra* note 148.

Court cited *Pierce* a number of times, the holding rests primarily on First Amendment Free Exercise grounds. Although the First Amendment grounds were sufficient for the holding, the Court used the First Amendment together with the *Pierce* doctrine. The Court noted:

> This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.
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> . . . .
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> . . . *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim . . . more than a 'reasonable relation to some purpose within the competency of the State' is required . . . .[88]

The Court has not decided a case dealing with home education in isolation from religious considerations. However, there is some dicta relating to the issue. In *Board of Education v. Allen*,[89] a school board challenged a New York law "requir[ing] local public school authorities to lend textbooks . . . to all students in grades seven to 12, including those in private schools." The challenge was based on the First Amendment Establishment and Free Exercise clauses.[90] The Court rejected these arguments, stating that because the statute was neutral with respect to religion, the state had not favored or harmed any particular religion.[91] The textbooks loaned would not be used as an aid to teaching religion in religious schools, but rather to further the legitimate state goal of educating all children.[92] The Court cited *Pierce* for the proposition that parents may meet their obligation to satisfy the state's interest in education by sending their children to a religious school, as long as that school met certain requirements set

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88. 406 U.S. at 233.
89. 392 U.S. 236 (1968).
90. *Id.* at 236.
91. *Id.* at 243-44.
92. *Id.* at 244-45.

by the state.[93] The Court noted that:

> a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which . . . employ teachers of specified training . . . . Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.[94]

In essence, the *Allen* dictum acknowledges that state courts have upheld broad restrictions on the parental prerogative because some parents might not be able to teach their children adequately.

More recent cases indicate that the state may not prevent all parents from engaging in an activity related to their child's upbringing merely because some parents might not act in their child's best interests. This is especially true when it is possible to monitor individually the competency of parents engaging in the activity. In *Stanley v. Illinois*,[95] the Court struck down an Illinois statute preventing an unwed father from taking custody of his children upon their mother's death.[96] The Court stated that if the father had adequately fulfilled his responsibilities to the children (i.e., he was a "fit father"), then the state could not assert a compelling interest in caring for the children.[97] Similarly, in *Parham v. J.R.*,[98] the Court made the point that "the statist notion that governmental

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93. *Id.* at 245-46.

94. *Id.* at 245-47. The Court cited People v. Turner, 263 P.2d 685 (Cal. Ct. App. 1953), *appeal dismissed*, 347 U.S. 972 (1954), for this last proposition. In that case, the court relied in part on the fact "only eleven of the forty-eight states permit by statute that instruction may be given at home by their parent or tutor." *Id.* at 688. This has changed drastically since Turner was decided in 1953. *See supra* note 13 and accompanying text.

95. 405 U.S. 645 (1972).

96. *Id.* at 646.

97. *Id.* at 657-58.

98. 442 U.S. 584 (1979).

power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."[99] Thus, it appears that the *Allen* dictum has been at least implicitly rejected by the Court. Although they do not specifically address a parental prerogative to home educate one's child for secular reasons, *Parham* and *Stanley* indicate that a parental right to direct a child's secular upbringing and education exists. Because these cases (addressing commitment proceedings and child custody) rely on *Meyer* and *Pierce* (involving education) for the existence of the right, it appears that the right applies in a wide variety of situations involving children.

*B. The Michigan Supreme Court's Approach*

The Michigan Supreme Court has developed its own interpretation of Supreme Court precedent as they relate to teacher certification requirements. In *Sheridan Road Baptist Church v. Department of Education*,[100] a religious school filed suit to prevent the enforcement of teacher certification requirements.[101] The school claimed such "rules . . . intrude[d] upon or threaten[ed] the operation of the 'church - schools' in their selection of their teachers."[102] The court, applying *Wisconsin v. Yoder*[103] and *Sherbert v. Verner*,[104] found the infringement on the plaintiffs' free exercise rights was minimal because it only made it more difficult, not impossible, to find teachers with the proper religious qualifications.[105] The state's compelling interests in ensuring the education of its citizens and in teacher certification itself outweighed this minimal infringement.[106] Furthermore, there was no less intrusive method by which those

99. *Id.* at 603 (emphasis added).
100. 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).
101. *Id.* at 373.
102. *Id.* at 374.
103. 406 U.S. 205 (1972).
104. 374 U.S. 398 (1963).
105. 396 N.W.2d at 387-88, 396.
106. *Id.* at 395-96.

interests could be realized.[107] A law that *minimally* infringes the fundamental right to free exercise of religion, and is the least onerous way of achieving a compelling state interest, is enforceable.

The court dealt with a similar issue in *Michigan Department of Social Services v. Emmanuel Baptist Preschool*,[108] in which the Department of Social Services (DSS) brought an action against a daycare center run by a church, after the principal and pastor of the center told the DSS it no longer wished to adhere to certain administrative rules.[109] The preschool contended that the state requirements infringed its First Amendment free exercise rights.[110] The court held that the "program director qualification rule," mandating that the director of the institute meet certain education requirements, substantially burdened the defendants' free exercise rights and thus subjected the requirement to strict scrutiny.[111] The court then stated that, even if the state could assert a compelling interest, there was a less onerous alternative available that could achieve that interest.[112] The DSS could independently evaluate the director's credentials to determine if the qualifications satisfied the minimum criteria.[113] Thus, the Michigan court acknowledged, when a state action *substantially* burdens a fundamental right, the state cannot assert a compelling interest to defeat that right if less burdensome means exist to achieve the state interest.

The court also acknowledged the existence of alternate grounds allowing the exercise of the rigorous strict scrutiny standard.[114] The court stated enforcement of the director qualification rule would infringe the fundamental parental right, described in *Pierce* and *Yoder*, "to direct the intellectual and religious education of their

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107. *Id.* at 394.
108. 455 N.W.2d 1 (Mich. 1990).
109. *Id.* at 2.
110. *Id.* at 2-3.
111. *Id.* at 16.
112. *Id.* at 17.
113. *Id.*
114. *Id.* at 16.

interests could be realized.[107] A law that *minimally* infringes the fundamental right to free exercise of religion, and is the least onerous way of achieving a compelling state interest, is enforceable.

The court dealt with a similar issue in *Michigan Department of Social Services v. Emmanuel Baptist Preschool*,[108] in which the Department of Social Services (DSS) brought an action against a daycare center run by a church, after the principal and pastor of the center told the DSS it no longer wished to adhere to certain administrative rules.[109] The preschool contended that the state requirements infringed its First Amendment free exercise rights.[110] The court held that the "program director qualification rule," mandating that the director of the institute meet certain education requirements, substantially burdened the defendants' free exercise rights and thus subjected the requirement to strict scrutiny.[111] The court then stated that, even if the state could assert a compelling interest, there was a less onerous alternative available that could achieve that interest.[112] The DSS could independently evaluate the director's credentials to determine if the qualifications satisfied the minimum criteria.[113] Thus, the Michigan court acknowledged, when a state action *substantially* burdens a fundamental right, the state cannot assert a compelling interest to defeat that right if less burdensome means exist to achieve the state interest.

The court also acknowledged the existence of alternate grounds allowing the exercise of the rigorous strict scrutiny standard.[114] The court stated enforcement of the director qualification rule would infringe the fundamental parental right, described in *Pierce* and *Yoder*, "to direct the intellectual and religious education of their

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107. *Id.* at 394.
108. 455 N.W.2d 1 (Mich. 1990).
109. *Id.* at 2.
110. *Id.* at 2-3.
111. *Id.* at 16.
112. *Id.* at 17.
113. *Id.*
114. *Id.* at 16.

children."[115] The rule was "a direct interference with the defendants' right to determine the nature of the moral values, religious beliefs, and educational preparation that their preschool age children shall receive."[116] A rule infringing both a religiously based fundamental right and the parental right, the court stated, is subject to strict scrutiny.[117] This established the fundamental nature of the right of parents to direct the religious education of their children. Whether it also established a right to direct their moral and intellectual development in isolation from religious considerations is not clear from the opinion.

The most recent decisions addressing home education and the Michigan teacher certification requirement came as a result of three cases decided at the same time in 1993. One of these dealt with technical points of law.[118] Of the other two, *People v. DeJonge*[119] clearly delineated the range of parental authority when parents turn to home education for religious reasons. The third case, *People v. Bennett*,[120] dealt with parental authority when parents home educate their children for secular reasons.

In *DeJonge*, uncertified parents were teaching their children at home for religious reasons.[121] The parents were convicted of violating the Michigan certification requirement, fined, and told to arrange for instruction by certified teachers.[122] The Michigan Supreme Court granted certiorari after several appeals. The court, applying strict scrutiny, determined that the defendants' right to Free Exercise of Religion was directly burdened by the restriction.[123] The court went on to state that the defendants' free exercise interest outweighed the state's asserted interest in compulsory education.[124]

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115. *Id.* (citation omitted).
116. *Id.* at 17.
117. *Id.* at 16.
118. Clonlara, Inc. v. Board of Educ., 501 N.W.2d 88 (Mich. 1993).
119. 501 N.W.2d 127 (Mich. 1993).
120. 501 N.W.2d 106 (Mich. 1993).
121. 501 N.W.2d at 130.
122. *Id.*
123. *Id.* at 134-37.
124. *Id.* at 138-40.

Furthermore, even if the state's interest was controlling, the state had presented no evidence that certification was essential to furthering that interest.[125] Therefore, the state failed to carry its burden.[126] Additionally, the state failed to demonstrate that there was no less onerous alternative available to accomplish the state's interest.[127] The court noted:

> [T]he nearly universal consensus of our sister states is to permit home schooling without demanding teacher certified instruction. Indeed, many states have recently rejected the archaic notion that certified instruction is necessary for home schools. Within the last decade, over twenty states have repealed teacher certification requirements for home schools.[128]

In *People v. Bennett*,[129] on the other hand, the court addressed parents who chose to home educate their children for secular reasons.[130] In this case, uncertified parents[131] had removed their children from public schools because of dissatisfaction with those schools.[132] As was the case in *DeJonge*, standardized test results indicated their children were progressing well academically.[133] Nonetheless, they were convicted of violating Michigan's compulsory education laws.[134] The parents, relying primarily on *Pierce* and *Yoder*, asserted that they had a right, derived from the Fourteenth Amendment, to direct the education of their children.[135] The Michigan Supreme Court held that because no case

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125. *Id.* at 140.
126. *Id.* at 143-44.
127. *Id.*
128. *Id.* at 141.
129. 501 N.W.2d 106 (Mich. 1993).
130. *Id.* at 108.
131. *Id.* at 109.
132. *Id.* at 107-09.
133. *Id.* at 109.
134. *Id.*
135. *Id.* at 107-08, 112-13.

demonstrated "the existence of a Fourteenth Amendment fundamental right of parents to direct their children's secular education free of reasonable regulation," the parents did not "have such a constitutional right requiring a strict scrutiny standard."[136] The court indicated that, at least for home education, *Pierce* and *Yoder* applied only in a religious context.[137] The court stated it is "only when the interests of parenthood are combined with the Free Exercise Clause . . . that parents are entitled to constitutional protection of a fundamental right."[138] Because a fundamental right was not involved, the court applied minimal scrutiny, and concluded that because certification requirements were at least debatably "reasonably related to [the] legitimate state interest" of ensuring education of its children, the certification requirement was legitimate.[139]

Justice Riley, in a partial concurrence, disagreed with the majority's interpretation of the United States Supreme Court cases. Riley based her opinion on her belief that the statute, as applied, was invalid even under a minimal scrutiny test.[140] However, relying on *Meyer*, *Pierce*, and *Parham*, Riley also found a parental liberty interest independent of religious considerations in "direct[ing] the upbringing and education of children under [the parent's] control."[141] The right was not absolute, but could be outweighed by the state's compelling interest in educating its citizens under some circumstances.[142] Riley maintained that the certification requirement burdened this right, and that the state had not demonstrated that its admittedly substantial interest in educational achievement was served by the requirement.[143] Because the certification requirement was not shown to advance educational achievement, Riley maintained that the state's

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136. *Id.* at 111-12.
137. *Id.* at 112.
138. *Id.* at 114 (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).
139. *Id.* at 116.
140. *Id.* at 125-26 (Riley, J., concurring in part and dissenting in part).
141. *Id.* at 121-23.
142. *Id.* at 123.
143. *Id.* at 125.

only real interest was in achieving teacher certification, and not in ensuring compulsory education.[144] This interest was not a compelling one, and was insufficient to trump the parents' interest in directing the education of their children.[145]

Thus, the Michigan Supreme Court approach to substantive due process reflects the approach of the United States Supreme Court in most respects. It differs in that the Michigan Court does not appear to recognize a fundamental right of parents to direct the secular upbringing and education of their children. Alternatively, the Michigan court may recognize such a right, as long as the right is subject to reasonable regulation, but considers the onerous certification requirement to be reasonable.

## III. ANALYSIS

The United States Supreme Court has developed a method for dealing with certain fundamental rights implicitly or explicitly protected by the Constitution. If a state statute or regulation infringes on such a right, the court will strictly scrutinize the rule to determine if it is essential to securing a truly compelling state interest,[146] and if the rule is "narrowly tailored" to serve that interest.[147] If the rule is not essential to serving the state interest, or if less burdensome methods are available that will secure the interest, the state rule cannot be used against an individual asserting a fundamental right.[148] If the Court determines that no fundamental

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144. *Id.* at 124.

145. *Id.* at 125-26.

146. *See, e.g.*, San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-40 (1972).

147. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Roe v. Wade, 410 U.S. 113, 155-56 (1973).

148. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 235-36 (Blackmun, J., concurring); *Zablocki*, 434 U.S. at 389. Because of the Court's recent decision in Employment Div. v. Smith, 494 U.S. 872 (1990), there is now an exception to this rule. *Smith* dictated that when a generally applicable law infringes upon one's right to the free exercise of religion, in most cases the Constitution does not require that the law be subjected to strict scrutiny. Whether the *Smith* rationale will be applied to other fundamental rights is questionable. Only four other justices agreed with

right has been asserted, it will apply "minimal scrutiny" or the

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Justice Scalia's majority opinion. Furthermore, the decision attracted a great deal of criticism. For instance, in People v. DeJonge, 501 N.W.2d 127 (Mich. 1993), the Michigan Supreme Court stated, "We are not unaware of the criticism generated in reaction to *Smith* . . . . Nevertheless, this Court must follow the interpretation of the Free Exercise Clause in the prevailing opinions of the United States Supreme Court, 'even though we may be in accord with the dissenting opinions in those cases.'" *Id.* at 134 n.27 (citations omitted); *see also* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 116 (1991) ("[The Court has] abdicat[ed] its constitutional duty to enforce the free exercise clause."); Stephen Reinhardt, *Keynote Address, The First Amendment: The Supreme Court and the Left-With Friends Like These*, 44 HASTINGS L.J. 809, 817 (1993) ("Justice O'Connor [correctly] said [the decision was] inconsistent with our historic commitment to religious liberty and the preservation of minority rights."); Stephen L. Carter, Comment, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 118 (1993) ("the Supreme Court's horrible 1990 decision."). For a more comprehensive list, see *DeJonge*, 501 N.W.2d at 134 n.27. Most importantly, Congress recently neutralized any effects that *Smith* would have upon those practicing religion by passing the Religious Freedom Act of 1993. 42 U.S.C.S. §§ 200066-200066-4. Section 3 of the act provides that "Government shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability except . . . [if the law burdening such exercise] is in furtherance of a compelling government interest and . . . is the least restrictive means . . . ." 42 U.S.C.S. 200066-1. Thus, the act provides protection equal to that provided by the Constitution itself, as interpreted by the Court, before *Smith*.

On the other hand, the *Smith* case clearly *allows* Congress or state legislatures to pass generally applicable laws that substantially burden religion, without asserting any compelling interest. It is difficult to believe that the Court would be more deferential to rights distilled from tradition and impliedly protected by the Fourteenth Amendment (e.g., the parental right of control) than it is to those rights explicitly guaranteed by the Bill of Rights. If a right explicitly mandated by the First Amendment can be defeated by a generally applicable law, can one expect that a parental right, or a right to marry, or to live with one's nuclear family will be protected under similar circumstances, when none of these rights are explicitly described by the Bill of Rights?

*Smith* was reaffirmed, but not expanded, in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993). The Court, relying on *Smith*, stated that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 2226.

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"reasonable relationship" test to the state law.[149] To pass this test, the state law need only show that the measure is "reasonably related to a legitimate state interest."[150]

Because of the difference in the rigor of the tests applied for laws affecting fundamental rights and those affecting conduct not protected by such a right, it is crucial to determine if a fundamental right exists with a scope broad enough to protect conduct engaged in by a person asserting such a right.

### *A. What is the Scope of the Right Established in* Meyer, Pierce, *and* Farrington?

Numerous United States Supreme Court cases recognize a parental right to direct the education and upbringing of one's children. This right was first recognized in cases dealing with a parental prerogative to send one's children to the private school of their choice. More recent cases make it apparent that the right applies in a variety of situations having to do with educating or raising one's children.

In *Meyer v. Nebraska*,[151] the Court addressed a teacher's claim of a right to participate in the profession of his choice under the Fourteenth Amendment,[152] and the right of parents to engage him.[153] The Court determined that a statute forbidding the teacher from teaching German "unreasonably infringe[d] the liberty guaranteed . . . by the Fourteenth Amendment."[154] In describing the scope of this liberty, the Court said the amendment guaranteed "the right . . . to engage in any of the common occupations of life . . . and bring up children."[155] The Court discussed what was apparently a subset of the

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149. *See, e.g.*, People v. Bennett, 501 N.W.2d 106, 115-16 (Mich. 1993) (citing Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)).

150. *Id.* at 112.

151. 262 U.S. 390 (1923).

152. *Id.* at 391-95.

153. *Id.* at 400.

154. *Id.* at 399.

155. *Id.*

right to direct the upbringing of the child, the parental right and duty to control the education of their children.[156] This was supported by *Pierce v. Society of Sisters*,[157] in which the Court again acknowledged the Fourteenth Amendment right "of parents and guardians to direct the upbringing and education of children under their control."[158]

The Supreme Court addressed the Fifth Amendment right of parents to direct the education of their children in *Farrington v. Tokushige*.[159] The Court stated that the legislation challenged, which heavily regulated private schools, would prevent parents from educating their children as they thought best, and in a way "we [the Court] cannot say is harmful."[160] Relying on the "general doctrine touching rights guaranteed by the Fourteenth Amendment to . . . parents . . . in respect of attendance upon schools,"[161] the Court affirmed the court of appeals decision invalidating the law.[162]

In none of these early cases did the Court strictly limit its holding to the facts of the case or to a private school context. It is noteworthy that in *Meyer* and *Pierce* the Court acknowledged the existence of a right to direct not only the education of their children, but also their upbringing.[163] The Court in *Farrington* confirmed the wide breadth of the right of parental control established in the preceding cases by referring to it as a "*general doctrine*."[164]

Even if the Court's language had not been as sweeping, many later cases discussing the parental right indicate that it is not confined to the private school context, or even to situations involving education generally.[165] In these cases, the Court has most often

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156. *Id.* at 400.
157. 268 U.S. 510 (1925).
158. *Id.* at 534-35.
159. 273 U.S. 284 (1927).
160. *Id.* at 298.
161. *Id.*
162. *Id.* at 299.
163. *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.
164. 273 U.S. at 298.
165. The Court has also described the parental control right as one aspect of the broader right protecting individual privacy addressed in Griswold v.

described the right as protecting the discretion of parents to direct the upbringing of their children.[166] The Court has construed the parental right to cover nearly any activity encompassed by this language. Using several slightly differently worded versions of this right, the Court, relying on *Meyer* or *Pierce*, has recognized parental rights in cases involving the distribution of religious literature by a minor,[167] institutionalization procedures,[168] and paternal custody rights.[169]

There are a few cases that might appear to limit the scope of the parental right. However, most of these merely highlight the fact that, like most fundamental rights, the right discussed in *Pierce* is not absolute,[170] or that the *Pierce* doctrine does not create "positive" rights to government assistance, but merely confers a right to direct the education of one's children free from unreasonable government interference.[171] The case most hostile to home educators relying on the parental right is *Board of Education v. Allen*.[172] However, *Allen* does not restrict the type of activity encompassed by the right, but rather the degree of regulation the state can impose on a party

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Connecticut, 381 U.S. 479 (1964). This general right embraces such divergent issues as the right to secure birth control pills and related information (*id.* at 482-85), abortion rights (Roe v. Wade, 410 U.S. 113, 152-53 (1973)), the ability of a municipality to dictate who may live in a particular dwelling (Moore v. East Cleveland, 431 U.S. 494, 500-03 (1977)), and the requirement that both parents, rather than only one, must approve a minor's abortion (Hodgson v. Minnesota, 497 U.S. 417, 446-47 (1990)).

166. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979) ("interests in and responsibility for the upbringing of their child"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("rights to conceive and raise one's children"); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("authority . . . in the rearing of [the parent's] children").

167. *Prince*, 321 U.S. at 164-67.

168. *Parham*, 442 U.S. at 602-04.

169. *Stanley*, 405 U.S. at 657-58.

170. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176-77 (1976), in which the Court discussed the state's right to impose restrictions upon parental discretion.

171. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 462 (1973) (*Pierce* does not entitle private schools to government assistance).

172. 392 U.S. 236 (1968).

asserting it.[173]

Therefore, it appears that the parental right originally recognized in *Meyer* is broad enough to cover most situations having to do with raising or educating a child. Presumably, this would include home schooling of a child.[174] It would be absurd to exclude a parent's prerogative to educate their child at home from the scope of the right merely because the original three cases addressed private school rather than home school situations, when the parental rights doctrine has been interpreted by the Supreme Court to apply to such diverse subjects as custody rights and commitment proceedings.

*B. Is the Right Fundamental?*

Even if the parental right is broad enough to encompass home schooling, courts apply strict scrutiny only if a state action infringes a *fundamental* right. Thus, it is necessary to determine if the parental right is one that can be considered fundamental. Fundamental rights are derived from the Bill of Rights[175] or are distilled from tradition.[176] Those derived from tradition are "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[177]

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173. *Id.* at 245-46. See *infra* note 204 for regulations affecting fundamental rights.

174. Whether the right is broad enough to encompass home education was implicitly determined in Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court in that case determined that the Free Exercise Clause in conjunction with the parental right to direct a child's religious upbringing, dictated by *Pierce*, subjected a state compulsory education law to strict scrutiny. *Id.* at 233-34. Because this ruling was based in large part on free exercise grounds, one cannot cite *Yoder* for the proposition that the parental right, by itself, rises to the level of a "fundamental" right. However, one can rely on the case to say that the parental right is relevant in a home education context.

175. An example of a fundamental right is the right to free exercise of religion, derived from the First Amendment, and asserted in People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) and other cases.

176. Snyder v. Massachusetts, 291 U.S. 97 (1934).

177. Twining v. New Jersey, 211 U.S. 78, 106, 111-12 (1908).

In *People v. Bennett*,[178] the Michigan Supreme Court held that "a parent's Fourteenth Amendment right to direct a child's education is not one of those rights described by the United States Supreme Court as fundamental."[179] Part of the rationale for this categorical rejection of the parental right can be gleaned from a footnote. In that footnote, the court stated that because the language in *Meyer*, *Pierce*, and *Farrington* dictated that the state or federal actions in those cases "*unreasonably interfered* . . . with the liberty interests of the parents or teacher," only minimal scrutiny had been applied in those cases.[180]

This analysis is flawed. The minimal scrutiny test requires only that a state law is at least arguably "*reasonably related* to a legitimate state interest."[181] The burden resulting from application of the law on the party challenging it, regardless of whether it is reasonable or unreasonable, is irrelevant.[182] Obviously, this is a very easy standard for the state to meet. The only relationship this test has to the one used in *Meyer*, *Pierce*, and *Farrington* is the use of the word "reasonable." Rigorous examination and rejection of the contested laws by the Court in those cases was similar to strict scrutiny as applied today and unlike the cursory treatment the Michigan court gave the contested statute in *Bennett*.[183]

In *Meyer*, the United States Supreme Court stated, "Perhaps it would be highly advantageous if all had [a] ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means."[184] Thus, the Court acknowledged that the law, prohibiting the teaching of certain languages, might be "reasonably related" to a legitimate state interest of increasing literacy among immigrants. Nonetheless, it was prohibited because of a conflict with

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178. 501 N.W.2d 106 (Mich. 1993).

179. *Id.* at 108.

180. *Id.* at 114 n.26 (emphasis added).

181. *Id.* at 116 (emphasis added).

182. The court concentrates only on the relationship between the law passed and on the alleged interest of the state in determining constitutionality. *Id.*

183. 501 N.W.2d 106 (1993).

184. 262 U.S. 390, 401 (1923).

the Fourteenth Amendment of the Constitution. In the modern "minimal scrutiny" test, the analysis ends once a reasonable relationship to a legitimate state purpose is found.[185] When such a relationship exists under a minimal scrutiny analysis, by definition, there is no constitutional barrier to implementation of the law.[186] It is instructive to note that the "desirable end . . . prohibited means" discussion in *Meyer* directly follows the statement "the State may do much, go very far, indeed, in order to improve the quality of its citizens . . . but the individual has certain *fundamental rights* which must be respected."[187]

Of course, a state can defeat a fundamental right if it demonstrates a compelling interest exists. However, this is not a light burden.[188] Although it did not use the words "compelling interest," the *Meyer* Court did point out that "[n]o emergency has arisen which renders [dissemination of] knowledge [to private school students] so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[189] This strong language describes a "compelling state interest" rather than an arguable relationship to some legitimate, but not compelling, state goal, as would be appropriate in a "minimal scrutiny" analysis.

As previously mentioned, all three early "parental rights" cases apply language characteristic of both the minimal scrutiny and strict scrutiny tests as applied today.[190] Given the apparent application of the strict scrutiny standard in these cases, the logical explanation for the use language characteristic of "minimal scrutiny" in the opinions is that, as noted by Justice Riley in *Bennett*, "[e]arlier this century, the Supreme Court had yet to develop the varying degrees of

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185. 501 N.W.2d at 116.

186. *See supra* note 182 and accompanying text.

187. 262 U.S. 391, 401 (emphasis added).

188. States routinely assert such interests in response to assertions of fundamental rights. This usually fails. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 469 (1990); Parham v. J.R., 422 U.S. 584, 604-05 (1979); Moore v. East Cleveland, 431 U.S. 494, 497-500 (1977).

189. 262 U.S. at 403.

190. *See supra* note 69 and accompanying text.

scrutiny ubiquitously applied in the modern era. The recognition of a constitutional right did not necessarily result in a clear specification of the particular degree of scrutiny to be applied."[191] *Meyer*, *Pierce*, and *Farrington* were decided in the 1920s.[192]

The Michigan court's rejection of the parental right was also based on its interpretation of the holdings in *Pierce* and *Yoder*.[193] In these cases, the United States Supreme Court recognized, at a minimum, a fundamental right to direct the *religious* upbringing of one's children.[194] The Michigan court acknowledged this right, but declined to recognize a fundamental parental right when no religious issues were involved.[195]

Even if one accepts the premise that the Court's holdings in *Pierce* and *Yoder* were limited to situations in which a child's religious education was at issue,[196] other Supreme Court decisions indicate that the parental right also applies to a number of circumstances having nothing to do with religion.[197] Furthermore, recent cases confirm the "fundamental" nature of the right. The Court has referred to the parental right as one of "several fundamental constitutional guarantees";[198] "A [Constitutional] guarantee of a right of personal privacy . . . [derived from] the concept of liberty guaranteed by the first section of the Fourteenth Amendment [that] . . . . can be deemed 'fundamental' or 'implicit in

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191. 501 N.W.2d 106, 123 n.10 (Mich. 1993) (Riley, J., dissenting in part).

192. Specifically, 1923 (*Meyer*), 1925 (*Pierce*), and 1927 (*Farrington*).

193. 501 N.W. 2d 106, 112-13 (1993) (citations omitted).

194. *Id.*

195. *Id.*

196. Some commentators find support in *Yoder* for a parental right to direct the education of children, which is independent of religious considerations. *See, e.g.*, Michael Knight, Comment, *Parental Liberties Versus the State's Interest in Education: The Case for Allowing Home Educatio*n, 18 TEX. TECH. L. REV. 1261, 1272-74 (1987); Branton G. Lachman, Comment, *Home Education and Fundamental Rights: Can Johnny's Parents Teach Johnny?*, 18 WASH. ST. L. REV. 731, 736-37 (1991).

197. *See supra* notes 165-69 and accompanying text.

198. Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965).

the concept of ordered liberty'";[199] "'fundamental', [requiring that a] statute must be narrowly and precisely drawn and that a 'compelling state interest' must be shown in support of the limitation" to uphold a state law;[200] and one of "certain interests requiring particularly careful scrutiny of the state needs asserted to justify their abridgement."[201] Thus, it appears that a broad parental right to direct the education and upbringing of one's children exists, and that the right is fundamental. For this reason, a court examining a statute that infringes the right should apply the strict scrutiny standard.[202]

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199. Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Palko v. Connecticut, 302 U.S. 319 (1937)).

200. Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

201. Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (favorably citing Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 522-55 (1961)).

202. Most commentators agree, in broad terms, with this analysis. *See, e.g.*, Knight, *supra* note 196, at 1275 ("[T]hese principles support a parent's right to choose a private home-based education alternative . . . as a matter of parental right . . . as long as the state's interest in education is satisfied."); Lachman, *supra* note 196, at 750-51 ("Courts apply the strict scrutiny test to such [compulsory education] statutes to decide if there is a compelling state interest which outweighs the parental rights."); Mark Murphy, Note, *A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?*, 8 GA. ST. U. L. REV. 457, 482 (1992) ("[P]arents have a fundamental right to direct their children's education . . . ."). *But see* Kirk Wood, *Constitutional Law-Home Instruction-State Procedural Requirements for Home Instruction Held Not Violative of Fundamental Rights. McDonough v. Ney, 599 F. Supp. 679 (D. Me. 1984)*, 16 CUMB. L. REV. 179, 188 (1985) ("Since education is not afforded . . . strict scrutiny . . . states may . . . exhaustively regulate the field."). Wood's analysis incorrectly relies upon the principle that there is no fundamental right to *receive* an education to support the conclusion that the state may extensively regulate the conduct of those exercising the parental right of control (but who do not claim any right to a government sponsored education).

Decisions by state and lower federal courts conflict, but cases refusing to recognize a fundamental parental right seem to predominate. For examples of cases recognizing the right, see Care and Feeding of Charles, 504 N.E.2d 592, 598-99 (Mass. 1987); State v. Whisner, 351 N.E.2d 750, 768-71 (Ohio 1976). For examples of cases refusing to recognize the right, see McDonough v. Ney, 599 F. Supp. 679 (D. Me. 1984) (attempt by home educators to assert *unqualified* right to home education); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); Jernigan v. State, 412 So. 2d 1242, 1246-47 (Ala. Crim. App. 1982); and, of course, People v.

### C. Should the Bennetts Have Been Able to Assert the Parental Right?

The court in *Bennett* emphasized the fact that fundamental or not, parents do not have a right to "direct their children's secular education free of reasonable regulation."[203] This statement is correct,[204] but is irrelevant because the Bennetts did not claim such an absolute right, as demonstrated by the fact that the Bennetts attempted to comply with regulations controlling curriculum and hours of attendance.[205] This shows that they recognized the state's

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Bennett, 501 N.W.2d 106 (Mich. 1993).

203. 501 N.W.2d at 111.

204. Under some circumstances states can enforce laws that burden the exercise of fundamental rights even if no compelling state interest exists. The law must be reasonably related to a legitimate state purpose, Hodgson v. Minnesota, 497 U.S. 417, 436 (1990) (Stevens, J., opinion), just as in a minimal scrutiny analysis. Furthermore, the rule must not place a heavy burden on the exercise of the right (unlike in a minimal scrutiny analysis). For instance, the state cannot allow parents to veto a minor's decision to have an abortion, but the state can force the minor to consult with a parent before making the decision, *id.* at 445, and because it only minimally burdens the minor's right to have an abortion, the state can enforce a 48-hour waiting period. *Id.* at 449. In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court, discussing the fundamental right to marry, stated "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." *Id.* at 386-87 (citations omitted). The Court then decided that even if the interests asserted by the state were "legitimate and substantial," the statute could not survive a strict scrutiny analysis. *Id.* at 388.

Similarly, while the state may impose "reasonable regulations for the control and duration of basic education," *Yoder*, 406 U.S. at 213 (citing *Pierce*), a law requiring formal education to age 16 (and thus effectively prohibiting home education) does not qualify as "reasonable regulation" when it "unduly burdens" a fundamental right (the free exercise of religion, in this case). *Id.* at 219-20. This should not be confused with the modern minimal scrutiny test, which is applied in the *absence* of a fundamental right and which is not concerned with the burden placed on the party challenging a state action. *See supra* notes 173-200 and accompanying text. Justice Riley discusses this distinction further in *Bennett*, 501 N.W. 2d at 123-24 n.10.

205. 501 N.W.2d at 109. The Bennetts "submitted proposals . . . for curricula to the superintendent of the Plymouth-Canton School District." *Id.* Furthermore,

ability to impose at least those requirements that were not "unduly burdensome," regardless of any parental right. Thus, the Bennetts claimed the protection of the parental right as it was described in *Meyer* and the following cases, knowing full well that the right was a qualified one. The activities engaged in by the Bennetts fell within the range of activities covered by the parental right as it has been interpreted by the United States Supreme Court. Because of this, the Michigan Supreme Court should have allowed them to assert the fundamental parental right and, therefore, should have strictly scrutinized the teacher certification requirement challenged by the Bennetts.

The certification requirement, as applied, could not have withstood strict scrutiny. This is particularly evident in light of the companion case to *Bennett*, *People v. DeJonge*,[206] in which parents educating their children at home for religious reasons were able to assert, as a fundamental right, the free exercise of religion as guaranteed by the First Amendment.[207] Except for the parental motivation for home educating the children, the facts of this case were remarkably similar to those in *Bennett*.[208] The same rule subjected to minimal scrutiny in *Bennett* was subjected to strict scrutiny in *DeJonge*.[209] The court determined that the DeJonges' right

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the range of subjects taught was similar to that of most public schools, as required by MICH. COMP. LAWS ANN. § 380.1561(3)(a) (West 1988), and the Bennetts originally claimed that they complied with the requirements of MICH. COMP. LAWS ANN. § 388.551 (West 1988), which pertains to hours of instruction. *Id.* If they had claimed a right that was not subject to reasonable regulation, there would have been no reason to even attempt to comply with those code sections governing aspects of private school education other than teacher certification.

206. 501 N.W.2d 127 (Mich. 1993).

207. *Id.* at 129.

208. The parents in both cases taught their children at home, were not certified to teach, and did not utilize certified teachers. In both cases, the court admitted that the education of the children was successful. *Bennett*, 501 N.W. 2d at 107-11; *DeJonge*, 501 N.W.2d at 129-31. In *DeJonge*, the court stated, "[W]ith respect to the DeJonge children, the trial judge noted that he was 'very impressed with . . . the reports that apparently are very, very favorable . . . on the education of the children.'" *DeJonge*, 501 N.W.2d at 130.

209. 501 N.W.2d at 108; 501 N.W.2d at 129.

to free exercise of religion was heavily burdened by the law.[210] Because of this burden, the state would have to assert a compelling interest necessary to avoid an immediate threat to the safety or welfare of the state.[211] The court acknowledged the state's power "to impose reasonable regulations for the control and duration of basic education,"[212] but said that the interest *asserted* by the state, compulsory education of its citizens, was not an absolute interest.[213] Furthermore, upon close examination the court determined that the state could not claim that the rule was necessary to secure its interest in compulsory education, because the DeJonges (like the Bennetts) were successfully educating their children, thus fulfilling the state's interest.[214] The DeJonges were therefore entitled to an exemption from the law.[215] Had the *Bennett* court recognized a fundamental parental right, the analysis would have been nearly identical to the strict scrutiny analysis used in *DeJonge*, and the court would have found the certification requirement unenforceable.[216]

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210. 501 N.W.2d at 136-37.

211. *Id.* at 137.

212. *Id.* at 138.

213. *Id.* at 139.

214. *Id.* In reality, the only interest the state had was in the certification requirement itself, and this was not "compelling." *Id.* at 141. The United States Supreme Court applied similar reasoning to situations in which the parental (rather than free exercise) right was asserted in *Stanley* and *Parham*, *supra* notes 95-99 and accompanying text. The holdings in those cases reflect the fact in most cases a law that heavily burdens a fundamental right but is not necessary to achieve a compelling state interest, with respect to the parties before the Court, will not be enforceable. *See also* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (in a free exercise case, the state must show that application of its law to an Amish community, in particular, was necessary to secure compulsory education). Success by the parents in achieving a state interest, in protection or education of children for instance, serves as a "less burdensome alternative means" than the state law, preventing the state from enforcing the law.

215. 501 N.W.2d at 144.

216. The Bennetts clearly had satisfied the state's interest in ensuring the education of their children. The court noted that three of the four children were at or above their grade level. 501 N.W.2d at 109. The performance of the fourth had improved since the Bennetts removed him from public schools. *Id.* at 109 n.6.

## IV. CONCLUSION

In *DeJonge*, the Michigan Supreme Court recognized the state may not require parents who are home educating their children for religious reasons to be certified teachers.[217] Most home educating parents will be able to assert such reasons.[218] The court is deferential to claims that home education is being carried out because of sincerely held religious beliefs.[219] Because the *Bennett* court failed to recognize the parental right described by the United States Supreme Court, there now exists a small "underclass" of Michigan parents who may not engage in home education if they so desire. The benefits supposedly derived from the certification requirement[220] could be gained without effectively prohibiting the practice for secular home educators by applying one of the methods used by our sister states.[221] Because of this, the Michigan Legislature should eliminate the requirement for all home educators and replace it with one or more less onerous methods of ensuring that home educators fulfill their duties.

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217. 501 N.W.2d at 144.

218. *See supra* note 3.

219. "The Court must accept a worshipper's good faith characterization that its activity is grounded in religious belief." *DeJonge*, 501 N.W.2d at 135.

220. If the benefit derived from the rule is it ensures that home educated children are taught by competent instructors, the number of Michigan children "protected" by the statute must have declined precipitously as a result of the holding in *DeJonge*. Many home educators engage in the practice for religious reasons. *See, e.g., supra* note 3; Smith & Klicka, *supra* note 2, at 302. *DeJonge* allows non-certified home educators engaging in the practice for religious reasons to continue the practice. The rule now applies only to "secular" home educators. Most parents engaging in the practice, like the DeJonges and the Bennetts, are competent teachers. *See, e.g.*, Lines, *supra* note 1, at 513; Smith & Klicka, *supra* note 2, at 302-04. Presumably, children of these parents do not need the protection of the rule. In the final analysis, the rule protects only children of incompetent home educators who engage in the practice for purely secular reasons. It is difficult to believe that this represents a very large number of children.

221. *See supra* notes 35-39 and accompanying text.