A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?

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A CONSTITUTIONAL ANALYSIS OF COMPULSORY SCHOOL ATTENDANCE LAWS IN THE SOUTHEAST: DO THEY UNLAWFULLY INTERFERE WITH ALTERNATIVES TO PUBLIC EDUCATION?

INTRODUCTION

When one thinks of childhood education today, public schools immediately come to mind. Still, a movement to establish public school alternatives has appeared during the last ten years. Specifically, home education of children has grown tremendously, and an estimated one million families are educating their children at home.1 "Home schooling," which exists in all fifty states,2 is defined as the teaching of a child in the home by the child's parent or guardian.3

This Note analyzes the state statutes controlling home education of children in Alabama, Florida, and Georgia. The primary focus is on what, if any, teaching qualifications these states require and whether these requirements pass constitutional muster. Part I discusses the background of compulsory attendance laws and home education. Part II surveys the developments that have occurred in federal law by documenting how both the United States Supreme Court and legal commentators have characterized the relative interests of the state, the child, and the parent in home education. Then a method for constitutional analysis of state compulsory attendance laws is suggested. Part III studies the developments in compulsory school attendance laws in Alabama, Florida, and Georgia. In Part IV, the method of analysis suggested in Part II is used to analyze the constitutionality of the compulsory attendance laws from those three states, with the focus on the

2. Ballman, supra note 1, at 15.
3. This Note uses the terms "home schooling," "home education," and "home instruction" interchangeably.
nature and legality of teacher certification requirements that may be imposed on parents choosing to educate their children at home.

I. BACKGROUND

Parents desire to educate their children at home for a number of reasons including religious conviction, lack of influence in public education, inability to afford private school tuition, apparent decline in quality of education in public schools, and nonreligious philosophical beliefs.\(^4\) While home education may seem novel, it is actually a return to an earlier way of American life.\(^5\)

Although compulsory education laws have been in effect since 1642,\(^6\) not until 1852 did compulsory school attendance become, for the first time in America, legally mandated.\(^7\) During the resulting interim, education was legally required and, in most locales, had to be accomplished through nonpublic means.\(^8\) Publicly operated schools were first established in 1647 in Massachusetts, though attendance was evidently not compulsory.\(^9\) In the colonial South, governmental encouragement of education was less rapid. The first southern state to enact laws purporting to encourage education was Virginia, which passed laws in 1642, 1643, and 1646, that required


\(^7\) *Id.* at 25. It is important to keep clear the distinction between compulsory education and compulsory attendance. As Kotin & Aikman note:

In common usage, it has become customary to employ the terms “compulsory attendance” and “compulsory education” interchangeably. This practice does not reflect the reality of the law. The term “compulsory education” rarely appears in the education laws of the states. It is merely “attendance”—at some facility or program which purports to be educational—which is generally required, and not “education.” . . . [O]nly California really uses [the term “compulsory education” in its education statutes] in a way that appears to require something called “education” to occur after the more easily compelled process called “attendance” has occurred.

*Id.* at 71.

\(^8\) *Id.* at 11.

\(^9\) *Id.* at 17-18.
apprenticeships for certain classes of deprived children such as orphans and illegitimates who would likely go neglected. Until 1705, the southern states relied on private citizens to carry out the apprenticeship programs since formal education in public schools did not exist. The southern states did not enact compulsory attendance laws until the early 1900s and were the last group of states to do so. Still, many of these state laws allowed local governments to choose whether to operate under them. After World War I, state governments became more active in enforcing compulsory attendance laws. Beginning in the 1920s and continuing through today, developments in both federal and state laws have set the stage upon which parents may exercise their desire to educate their children at home.

II. HOME SCHOOLING AND CONSTITUTIONAL FREEDOMS

Several U.S. Supreme Court cases have established principles that can be used in analyzing the constitutionality of home education. As will be seen, the Court has tended to analyze these cases from the standpoint of parental interests versus state’s interests in a child’s education. Some commentators have argued that the child’s interests should also be included in the constitutional analysis, but the Court has not explicitly done

10. Id. at 19-20.
11. Id. at 20.
12. Id. at 26.
13. Id.
14. Id. at 31.

Lupu argues that, in Massachusetts, state law creates an entitlement to an education and that the “[c]hildren therefore possess a fourteenth amendment ‘property’ interest in education and a corresponding constitutional interest in a meaningful opportunity to be heard prior to the deprivation of that interest.” Lupu, supra at 978. Lupu concludes that “[r]egardless of whether parents or school officials are the moving parties in a decision to remove children from school, the children are constitutionally entitled to some form of hearing at which the lawfulness of any such decision is tested.” Id. Lupu is only partially correct. The Constitution prohibits only state action, not private parental action. Thus, Lupu is correct in concluding that action by the state to remove a child from school invokes a Fourteenth Amendment due process right in the child to a hearing (assuming that state law does in fact create a property interest in education). However, Lupu is incorrect in concluding that private parental actions invoke the same due process rights because the Fourteenth
so. The rationale for and the interplay between the interests of the parent, the state, and the child in home education are examined below.

A. State Interests

The U.S. Constitution does not mention education, and the Supreme Court has not found a constitutionally implied right to an education.\(^\text{16}\) Thus, by virtue of the fact that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,”\(^\text{17}\) the struggle for control of childhood education may exist between parents and the state. From a historical perspective, the state is a newcomer to the task of controlling education.\(^\text{18}\)

Despite the relatively short period during which the states have had primary responsibility for the provision of education, the U.S. Supreme Court has long recognized and elaborated upon the nature of the state’s interest in education.\(^\text{19}\) In Pierce v. Society of Sisters,\(^\text{20}\) the Court said:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.\(^\text{21}\)

Amendment does not put any prohibitions on private conduct. See U.S. CONST. amend. XIV.

Stocklin-Enright presents the most cogent argument, one which places the child’s interests in the hands of the parents in a type of trust relationship. Stocklin-Enright, supra at 581-86. The parent will be presumed to act in the child’s best interests, but if the parent fails to do so, the state may intercede because the presumption is rebutted. Id. at 578.


17. U.S. CONST. amend. X.

18. See supra notes 6-15 and accompanying text. For a revealing discussion concerning the motivations and forces behind the transition from parental to state control over education, see Baker, supra note 4, at 537-42.

19. See infra notes 20-23 and accompanying text.


21. Id. at 534.
In Wisconsin v. Yoder,22 the Court recognized that the state’s interest in education is twofold: to prepare citizens to participate effectively and intelligently in our political system to preserve our freedom and independence, and to prepare individuals to be self-reliant and self-sufficient participants in society.23 Justice White offered a third state interest in his concurring opinion:24

[A] State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the lifestyle that they may later choose, or at least to provide them an option other than the life they have led in the past.25

One commentator, Brendan Stocklin-Enright, has described this third interest as the “right to make a ‘cultural’ guess,” that is, “the right to be able to predict the attributes of our future culture and design an ‘educational package’ to equip the child with the necessary cultural survival skills. Because no one knows what cultural skills a child will need as an adult, it is necessary to ‘guess.’” 26

State compulsory attendance statutes are supported by the two state interests mentioned by the majority and, arguably, by the one mentioned by Justice White: the need for citizens to be adequately educated so that they may participate effectively and intelligently in our political system, the need for citizens to be self-sufficient and self-reliant, and the need for citizens to be culturally developed.27

Stocklin-Enright has argued that only the first interest is truly vital to the state because government depends upon some

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22. 406 U.S. 205 (1972). Yoder and other parents were members of the Old Order Amish religion who, in violation of the Wisconsin compulsory school attendance law, refused to send their children to public school after the eighth grade. Id. at 207. The Amish parents believed that public schooling beyond the eighth grade would expose the family to censure by the church community and endanger the salvation of both the parents and the children. Id. at 209. The values inherent in the Amish religion were essentially ignored or even rejected by the public school curriculum; hence, an Amish child’s religious growth would have been seriously stifled by attendance in a public school. Id. at 210-11.

23. Id. at 221.

24. Id. at 240 (White, J., concurring).

25. Id.

26. Stocklin-Enright, supra note 15, at 577. This Note will refer to this interest as an interest in cultural development.

27. See supra notes 22-25 and accompanying text.
minimal level of reasonably intelligent participation by its citizens to survive; the other two interests are both interests of the child because they directly affect the child's future. While the state has a secondary interest in the child's ability to become self-sufficient, self-reliant, and culturally developed, the attainment of these goals is not essential to the survival of the state in its current form. This is not to say that failure to meet these goals would not be a burden on the state. Citizens unable to live self-sufficient lives could end up on government welfare or other subsidy programs and might contribute to increases in the level of crime. These potential and undesirable consequences are sufficient to give the state a "surveillance interest" in making sure that the child's best interests are being served. Yet because the Court has stated that parents are presumed to act in the best interests of their children, the "state has [only] a surveillance interest in making sure that the parents are fulfilling their duty to the child in meeting the demands of the child in respect to self-reliance and self-sufficiency as well as to cultural viability."

B. Child's Interests

In Yoder, Justice Douglas argued in his dissent that the rights of the child should be considered independently and that the Court should provide a child the opportunity to express her interests concerning education. Nonetheless, the Court defers to parental decision-making when Yoder is considered in light of

28. Stocklin-Enright, supra note 15, at 578. Specifically, survival of the state requires that its citizens be able to vote intelligently and to recognize the value of their ability to participate in the franchise, at least through voting. Id. The inability of the citizenry to do either one would likely result in government as we know it ceasing to exist. Id.
29. Id.
30. Id.
31. Id.
32. Parham v. J.R., 442 U.S. 584 (1979). The Court stated that [t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
the Court's assumption in *Parham v. J.R.* that parents act in their child's best interests. The extent of this assumption can be sensed from the Court's language in *Parham*:

That some parents "may at times be acting against the interests of their children"... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests... The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Clearly, a child needs some degree of guidance in decision-making relative to the child's level of maturity. The child's role in decision-making can include total submission to the decision of another about what the child shall do, collaborative decision-making, in which the child has roughly an equal say in the decision, and autonomous decision-making by the child. As to educational decisions, the choice of who will assist the child's decision-making process comes down to either the parent or the state. Given the Court's deference to parental decision-making as well as the recognition that the state has a legitimate interest in the child's education, Stocklin-Enright's argument that the parent act as a type of trustee of the child's rights is persuasive. Under this model, the child's interests are held in a type of trust by the parent whose degree of participation in the decision-making process is guided only by the child's ability to participate in the process in a meaningful way. An educationally emancipated child would be one requiring a relatively small amount of guidance by the trustee-parent because the child would be "able to demonstrate to an appropriate decision-maker the capacity and ability to make decisions affecting her interests in education that would, as far as it is possible to predict, be no more productive of potential

36. Id. at 602-03 (citations omitted).
38. Id. at 585-86.
39. See supra notes 32 and 36 and accompanying text.
40. See supra notes 22-36 and accompanying text.
42. Id. at 584.
harm than those of her parents." The state's role is limited to assuring itself that the child's best interests are being served. However, the presumption that parents act in their children's best interests appropriately puts the burden on the state to prove otherwise.

C. Parental Interests and Objections to Compulsory Attendance Laws

The deference given by the Court to parental guidance of their children's lives implies that parental interests are extensive. The character and extent of parental interests can be examined from the standpoint of the claims parents typically raise against the state compulsory attendance laws. Parents often allege that compulsory attendance laws violate the Free Exercise of Religion Clause and the Fourteenth Amendment Due Process Clause; parents also allege the statutes are unenforceable because they are unconstitutionally vague and they violate the due process requirement that a neutral and detached magistrate make the decision when a person comes to the government for a decision.

1. Free Exercise of Religion

Parents who educate their children at home for religiously motivated reasons have relied on the Free Exercise of Religion Clause when contesting a state law that threatened to burden their ability to home school. In Sherbert v. Verner, the Supreme Court established a test for determining whether a

43. Id.
44. Id. at 583-84.
45. See supra notes 32 and 36 and accompanying text.
47. Id. at 311.
48. 374 U.S. 398 (1963). Sherbert was a Seventh-Day Adventist whose religious beliefs dictated that she not work on Saturdays, the Sabbath day of her faith. Id. at 399. Because of her refusal on these grounds to work on Saturday, she was fired. Id. Other employers refused to hire her because of her unwillingness to work on Saturday. Id. Because Sherbert was unable to find a job that accommodated her religious beliefs, she filed for unemployment with the state of South Carolina, but was turned down because the state found that her religiously motivated unwillingness to work on Saturday was not an acceptable reason for her to turn down offers from employers willing to hire her upon the condition that she work on Saturdays. Id. at 400-01.
state law could constitutionally burden a person's ability to exercise her religious beliefs. Under the Sherbert analysis, a state law can burden a person's ability to exercise her sincerely held religious belief only when the law furthers a compelling state interest and no course of action other than enforcement of the law in question is available to the state to carry out its interest. Sherbert recognized that the right to exercise one's religious beliefs is fundamental and thus entitled to a strict scrutiny analysis by courts. The Sherbert test became the standard by which governmental conduct was measured when it purportedly burdened one's ability to exercise her religious beliefs; over the past twenty-six years, Sherbert has been cited by federal and state courts over 900 times.

In 1990, however, the free exercise claim of parents was affected by the Supreme Court's decision in Employment Division v. Smith. In Smith, Galen Black and Alfred Smith were fired from their jobs with a private drug rehabilitation organization after they ingested peyote for sacramental purposes at a ceremony of the Native American Church of which both were members. Oregon law defines peyote as a Schedule I controlled substance, and persons in possession of peyote are guilty of a felony. The Employment Division of the Oregon Department of Human Resources refused to grant employment benefits to Black or Smith because they had been fired for work-related misconduct. The Oregon Court of Appeals, however, reversed the findings of the Department and held that the denial of benefits to Black and Smith on the grounds that their religious practices constituted misconduct violated their free exercise

49. Id. at 398, 406-07. The individual has the burden of proving that her belief is a sincere religious belief. See Wisconsin v. Yoder, 406 U.S. at 215-16. In addition, the individual must show that the state action is a burden on the exercise of that belief. Id. at 218. The state has the burden of proving that its action furthers a compelling state interest and is the least restrictive means available to further that interest. Id. at 406-07.

50. See Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) ('Sherbert . . . held that . . . infringements [of religious freedom] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.').


52. 110 S. Ct. 1595 (1990).

53. Id. at 1597-98.

54. Id. at 1597.

55. Id. at 1598.
rights under the First Amendment.\textsuperscript{56} Citing \textit{Sherbert}, the Oregon Supreme Court affirmed and stated that the criminality of the peyote use was irrelevant because Oregon's sole interest in this case was to preserve the integrity of the unemployment benefits fund. According to the court, this was not a sufficiently compelling state interest to justify the burden on the free exercise rights of Black and Smith.\textsuperscript{57}

The State of Oregon appealed to the U.S. Supreme Court, arguing that the criminality of peyote use was relevant to the case, notwithstanding the Oregon Supreme Court's opinion to the contrary.\textsuperscript{58} The Supreme Court agreed and concluded that if a state has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it follows that it may impose the lesser burden of denying unemployment benefits to those discharged for engaging in that prohibited conduct.\textsuperscript{59} Still, the Court noted that before it could decide any further issues, the Oregon Supreme Court needed to decide whether sacramental use of peyote was in fact prohibited by Oregon's controlled substance law.\textsuperscript{60} On remand, the Oregon Supreme Court decided that the sacramental use of peyote was prohibited by the Oregon statute as written but that the prohibition violated the Free Exercise Clause.\textsuperscript{61} The Oregon court then reaffirmed its former holding that the State of Oregon could not deny unemployment benefits to Black and Smith for engaging in sacramental peyote use.\textsuperscript{62}

The State of Oregon then appealed to the Supreme Court a second time.\textsuperscript{63} The Supreme Court granted certiorari to decide whether the First Amendment's Free Exercise Clause allows a state to punish criminally the sacramental use of peyote; if so, the First Amendment would allow the state to deny unemployment benefits to persons dismissed from their jobs because of this religiously inspired use of peyote.\textsuperscript{64}

\begin{footnotes}
\item[56] Id.
\item[57] Id.
\item[58] Id.
\item[59] Id. (citing Employment Div. v. Smith, 485 U.S. 660 (1988)).
\item[60] Id.
\item[61] Id.
\item[62] Id.
\item[63] Id.
\item[64] Id. at 1598-99.
\end{footnotes}
Justice Scalia, writing for a majority of five, reinterpreted the free exercise of religion claim relying in part on Minersville School District Board of Education v. Gobitis,65 a 1940 case overruled in 1943 by West Virginia Board of Education v. Barnette.66 Essentially, the majority limited the use of the Sherbert test to cases in which the state has denied unemployment benefits.67 The Court said that the need for the Sherbert analysis arises from the fact that unemployment boards engage in "individualized governmental assessment" of the employee's reasons for the relevant conduct.68 The state statute at issue in Sherbert and other similar cases created a mechanism by which the state could exempt individuals from the law otherwise prohibiting the disbursement of unemployment benefits; thus, the Court said a test was needed to make sure that states refused to grant these exemptions for individuals making religious claims only when the state had a compelling reason.69 The potential in the unemployment cases for individualized discrimination warranted the Sherbert test. The Court, however, did not see the need to employ the Sherbert strict scrutiny analysis in Smith because it saw the Oregon controlled substance act as a generally applicable and otherwise valid provision that only incidentally burdened the sacramental use of peyote.70

The highly criticized result in Smith71 creates the rule that says a state law may incidentally infringe one's right to exercise her religious beliefs if the law in question is generally applicable

65. 310 U.S. 586 (1940); see Smith, 110 S. Ct. at 1600.
66. 319 U.S. 624 (1943); see Tyner, supra note 51, at 5.
67. Smith, 110 S. Ct. at 1602-03. Although unemployment benefits were denied to Smith and Black, the issue before the Court was not the legality of the denial of benefits but rather whether a state drug law can constitutionally prohibit the sacramental use of a controlled substance. Id. at 1597-98. Because a criminal prohibition against the sacramental use of a drug is a heavier burden on one's practice of religion than is the denial of unemployment benefits, a state that can constitutionally outlaw such sacramental use can clearly deny unemployment benefits to those fired for using illegal drugs. Id. at 1598.
68. Id. at 1603.
69. Id. (citing Bowen v. Ray, 476 U.S. 693 (1986)).
70. Id. at 1604 n.3. The abandonment of the Sherbert test seems premature, given that Justice O'Connor was able to concur in the judgment even after applying the Sherbert test. Id. at 1606-15.
71. Smith has generated a chorus of disapproval from a spectrum of otherwise ideologically differing groups. See Michael Farris, The Teaching Home, LEGAL NEWS, Aug.-Sept. 1990, at 49.
and religiously neutral. After Smith, one can construct the following approaches for using the free exercise of religion claim. First, one could attack a burdening statute on the grounds that it is not generally applicable. Second, one could allege that the statute is not religiously neutral. Third, language in Smith suggests that the free exercise defense will be given strict scrutiny if it is combined with other constitutionally based defenses. Fourth, as Justice Scalia suggests, religiously based exemptions can be sought through the political process. This last approach is not helpful to those who engage in religious practices not adhered to by the majority since in the current political system the majority rules. Smith shows that the Court, which for so long has been the protector of minority interests, may choose not to protect a minority’s interest.

2. Due Process

The second defense that a parent can raise against compulsory attendance laws is found in the due process guarantees of the Fourteenth Amendment. The Court has expounded on this right in several cases. In Meyer v. Nebraska, a tutor was convicted under a Nebraska statute that prohibited the teaching of any language other than English to any student not yet in the eighth grade regardless of the type of school in which the student was

72. Smith, 110 S. Ct. at 1601-02. The Court noted that the only decisions in which the First Amendment barred the application of a neutral, generally applicable law to religiously motivated action have involved the Free Exercise Clause in conjunction with other constitutional protections. Id. at 1601. The Court noted that Smith did not present such a “hybrid situation.” Id. at 1602. Presumably, if it had, the Court would have applied strict scrutiny by using the Sherbert test. From Justice Scalia’s opinion, one can infer that a state law infringing on a parent’s ability to home school her children will be subject to heightened scrutiny if the parent asserts her free exercise right in combination with her liberty interest recognized in Pierce and Yoder. See Smith, 110 S. Ct. at 1601 n.1. This would apparently create a “hybrid claim” as defined in Smith. Id. at 1602.

73. Id. at 1606.
74. See id. at 1613 (O’Connor, J., concurring).
75. See id. at 1606. Justice Scalia stated that

[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that avoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.
76. 262 U.S. 390 (1923).
enrolled.\textsuperscript{77} The Court recognized that Nebraska could reasonably regulate schools, but held that the foreign language prohibition was not related to any valid state purpose\textsuperscript{78} and violated the parents' right to direct the content of their children's education.\textsuperscript{79}

In \textit{Pierce v. Society of Sisters},\textsuperscript{80} the Society of Sisters, an Oregon corporation organized in 1880, conducted a junior college, a high school, and a primary school for children.\textsuperscript{81} The Society enjoyed "the valuable good will of many parents and guardians."\textsuperscript{82} Its primary school taught these children "the subjects usually pursued in Oregon public schools" for children of the same age.\textsuperscript{83} The Society also provided to its students "systematic religious instruction and moral training according to the tenets of the Roman Catholic Church."\textsuperscript{84} The State of Oregon subsequently enacted a statute in 1922 that required "every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him 'to a public school for the period of time a public school shall be held during the current year.'"\textsuperscript{85} Failure to do so was declared a misdemeanor.\textsuperscript{86} The Court ruled that a state may not compel public education and, at the same time, eliminate the private education alternative.\textsuperscript{87} The Oregon statute that practically eliminated the private school alternative was declared unconstitutional because the Court believed it to

unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . [A] child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{77} Id. at 396-97.
\item \textsuperscript{78} Id. at 402-03.
\item \textsuperscript{79} Id. at 400.
\item \textsuperscript{80} 268 U.S. 510 (1925).
\item \textsuperscript{81} Id. at 532.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 530.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 535.
\item \textsuperscript{88} Id. at 534-35.
\end{itemize}
**Farrington v. Tokushige**\(^{89}\) established the rule that a state may not entangle private schools in state-created regulations so as to effectively eliminate the distinction between a public and a private school.\(^{90}\) The State of Hawaii had sought to regulate the curriculum, textbooks, teacher qualifications, and the language spoken in a Japanese school.\(^{91}\) The Court held that such a restrictive statute impermissibly burdened the parents' right to direct their children's education.\(^{92}\)

In 1972 the Court in **Wisconsin v. Yoder**\(^{93}\) stated that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."\(^{94}\) The parents in **Yoder** objected to a Wisconsin compulsory attendance statute on the grounds that it violated their First and Fourteenth Amendment rights.\(^{95}\) The Court agreed that the parents were entitled to an exemption from the law.\(^{96}\)

One commentator appropriately observes that a pertinent question is whether the parental liberty interest recognized in **Yoder** is sufficient in itself to overcome the state's interest in compulsory school attendance.\(^{97}\) This inquiry is significant for two reasons. First, the parents in **Yoder** argued both First and Fourteenth Amendment rights.\(^{98}\) Second, the results in **Smith** radically changed the free exercise claim.\(^{99}\) As this commentator points out, however, **Yoder** cited with approval **Pierce, Meyer, and Farrington**, all of which "affirmed parental rights in making educational choices and involved no question of religious affiliation."\(^{100}\) Further, **Smith** referred to hybrid cases in which

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89. 273 U.S. 284 (1927).
90. Id. at 298.
91. Id. at 293-94.
92. Id. at 298.
94. Id. at 232.
95. Id. at 208-09.
96. Id. at 234.
97. Michael Knight, Parental Liberties Versus the State's Interest in Education: The Case for Allowing Home Education, 18 Tex. Tech L. Rev. 1261, 1273 (1987). Actually, the author refers to the state's interest in compulsory education. Id. For the proposition that there is an important distinction between compulsory education and compulsory attendance, see supra note 7. See also Baker, supra note 4, at 543-47.
98. See supra note 95 and accompanying text.
99. See supra notes 45-75 and accompanying text.
100. Knight, supra note 97, at 1274.
the Free Exercise Clause was at issue "in conjunction with other constitutional protections, such as... the right of parents acknowledged in [Pierce] to direct the education of their children."\(^{101}\)

Thus, the Court has recognized that parents have a fundamental right to direct the education of their children.\(^{102}\) As a fundamental right, it is afforded strict scrutiny, and only a compelling state interest can constitutionally burden that right.\(^{103}\)

3. Unconstitutional Vagueness and Neutral, Detached Magistrate

A third defense a parent may raise against a compulsory attendance law is the "void for vagueness" attack. In \textit{Connally v. General Construction Co.},\(^{104}\) the Court re-emphasized the rule that a statute will be found void because of vagueness if the forbidden conduct is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."\(^{105}\) This defense can be raised by parents who home school for religious reasons as well as by those who do so purely for secular motivations.\(^{106}\)

A fourth defense against state action may arise when a homeschooling parent is required to seek from a school official, such as a superintendent, a decision as to whether a nonpublic school form of education may be carried out in the school district.\(^{107}\) Due process of law requires that such a decision, which affects a parent's fundamental right,\(^{108}\) be made by a neutral and detached magistrate.\(^{109}\) One federal court has indicated that a school superintendent may not qualify as a neutral and detached

\(^{101}\) \textit{Smith}, 110 S. Ct. at 1601.
\(^{103}\) See cases cited supra note 102.
\(^{104}\) 269 U.S. 385 (1925).
\(^{105}\) Id. at 391.
\(^{106}\) See \textit{Smith & Klicks}, supra note 46, at 321. In fact, this defense led to the reversal of the conviction of a Georgia couple who had been charged with violating Georgia's compulsory attendance law. See infra notes 202-04 and accompanying text.
\(^{107}\) Smith & Klicks, supra note 46, at 325-28.
\(^{108}\) For the proposition that a parent has a fundamental right to home educate her child, see supra notes 80-101 and accompanying text.
\(^{109}\) \textit{John E. Nowak et al., Constitutional Law} 558 (2d ed. 1983).
decision-maker when the number of students in the public school system relates directly to the amount of state funding received by the school.110 Thus, a decision about whether a parent may home school cannot be made by a school superintendent or school board in keeping with due process requirements.

D. A Method for Analyzing State Compulsory Attendance Laws

The discussion above identified several elements that go into a constitutional analysis of state compulsory attendance laws. First, the state has a clear interest in assuring that children are sufficiently educated so as to be prepared to participate effectively and intelligently in our political system.111 Second, the child’s interests can be protected through a type of trust relationship whereby the parent, rather than the state, makes decisions for the child until the child reaches “educational emancipation.”112 Third, the parents’ interests are represented by the claims they may raise against compulsory attendance laws.113 These interests include the free exercise of religion,114 the Fourteenth Amendment due process liberty interest in directing the education of their children,115 the right to know what conduct is lawfully expected of them in directing their children’s education so that they are not subject to potential criminal liability under unconstitutionally vague statutes,116 and the right to have a neutral and detached magistrate decide whether their home school program is permissible or qualified.117

III. STATE STATUTES AND CASES

This section analyzes the compulsory attendance laws in Alabama, Florida, and Georgia in light of the principles identified in Part II.

110. See Smith & Klicka, supra note 46, at 326 (citing Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985), aff’d in part, rev’d in part, 815 F.2d 485 (8th Cir. 1987) (reversed only as to the district court’s decision concerning attorney’s fees)).
111. See supra notes 27-33 and accompanying text.
112. See supra notes 36-45 and accompanying text.
113. See supra notes 46-103 and accompanying text.
114. See supra notes 47-75 and accompanying text.
115. See supra notes 76-103 and accompanying text.
116. See supra notes 104-06 and accompanying text.
117. See supra notes 107-10 and accompanying text.
A. Alabama

Alabama law requires that a “child between the ages of seven and sixteen years attend a public school, private school, church school, or be instructed by a... private tutor.”118 Thus, a parent must consider either the private school, church school, or private tutor options.

If a parent chooses the private school option, certain requirements must be met to obtain a certificate from the State Superintendent of Education. These are:

(a) the instruction... shall be by persons holding certificates issued by the state superintendent of education;
(b) instruction shall be offered in the several branches of study required to be taught in the public schools of [Alabama];
(c) the English language shall be used in giving instruction; and
(d) a register of attendance shall be kept which clearly indicates every absence of each child from such school of a half day or more during each school day of the school year.119

Alternatively, parents may consider the church school option. A church school is defined as one offering “instruction in grades [kindergarten through twelve], or any combination thereof including the kindergarten, elementary, or secondary level and [ ] operated as a ministry of a local church, group of churches, denomination, and/or association of churches on a nonprofit basis which do not receive any state or federal funding.”120 The only requirement upon the church school is that it be operated as a ministry of a religious body or group of bodies.121 Apparently, parents could be allowed to teach in their homes as part of such a ministry.122

118. Ala. Code § 16-28-3 (1987). This statute assumes that the requirements for exemption from the compulsory attendance requirements are not met. § 16-28-6 lists the exemptions of physical or mental incapacity, children 16 or over, children who have met the requirements through high school, excessive distance from school where no public transportation is available, or children lawfully employed under child labor law provisions. Id.
119. Id. § 16-28-1(1).
120. Id. § 16-28-1(2).
121. Id.
122. Under § 16-28-7, there is an attendance reporting requirement for church
Parents may also qualify to teach their children at home under the private tutor option if several requirements are met. A private tutor is defined as an instructor "who holds a certificate issued by the state superintendent of education." The private tutor is required to give "instruction in the several branches of study required to be taught in the public schools of [Alabama], for at least three hours a day for 140 days each calendar year, between the hours of 8:00 a.m. and 4:00 p.m., and [must] use the English language in giving instruction." Additionally, before beginning the instruction of any child, the private tutor must file the location of the place of instruction, the names of the children being instructed, the subjects being taught, and the proposed times for instruction with the local school superintendent. The tutor must also "keep a register of work, showing daily the hours used for instruction and the presence or absence of any child being instructed and shall make such reports as the state board of education may require." The statute does not define what kind of certificate a tutor must hold, but the Court of Criminal Appeals of Alabama has stated the tutor must hold a teaching certificate equivalent to that held by a public school teacher. Thus, parents who wish to home school in Alabama but who do not possess a public school teaching certificate or its equivalent would have to use the private school or the church school options.

A dilemma arises when an Alabama parent lacking a teaching certificate desires to home school but does not desire to affiliate with a church school or does not live near a church of her denomination. The latter situation arose in Jernigan v. State.

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schools. Id. § 16-28-7. The parent or other person in charge of the child must maintain a record of enrollment and attendance with the local public school superintendent, the report must be countersigned by the administrator of the church school, and the parent has the express responsibility of getting the report to the public school superintendent. Id.

123. See infra notes 124-28 and accompanying text. The implication appears to be that the parent can either hire a qualified private tutor or serve as the private tutor herself if she meets all the statutory requirements.
125. Id.
126. Id.
127. Id.
The defendants, husband and wife, were practicing Catholics. The educational doctrines of their Order were "based on the traditional Catholic position that the education of children is the primary responsibility of the parents, and that the children should be brought up in a Catholic educational environment." The Jernigans "refused to send their children to the local public school on the grounds that to do so would violate traditional Catholic prohibitions against secular education and would expose their children to nonreligious educational influences." They believed that "if [they allowed] their children to be exposed to ... secular education or influences, then [they would be guilty of] a mortal sin if the religious salvation of the children [was] thereby endangered." The Jernigans did not live near a church school and taught their children at home using a Catholic correspondence course. The Jernigans adhered to all of the requirements under the private tutor option except one: Mrs. Jernigan was not a certified teacher, though she did possess a high school diploma. Mrs. Jernigan "made several attempts to have the course under which she was instructing her children approved as a substitute for public or [church] school attendance, but was informed by the State Superintendent of Education that [this approval] was not permitted under current regulations."

The State of Alabama brought charges against the Jernigans for violating the compulsory attendance law on the grounds that their children "were not attending public school or an approved substitute," and they were convicted and appealed on several grounds. The Jernigans argued that their conviction could not stand in light of the principles in Yoder and that their freedom of religion gave them the right to home school. Additionally, they argued "that their liberty, privacy, and family integrity [were] violated by the portion of the compulsory [attendance] law requiring private tutors to hold teaching

131. Id. at 1243.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id.
137. Id. at 1243-44.
138. Id.
139. Id.
140. Id.
141. Id.
certificates." The Alabama Court of Criminal Appeals ruled against the Jernigans on all counts and sustained the conviction.

An analysis of this decision reveals that the court failed to apply the constitutional analysis properly. At the time Jernigan was decided, the Sherbert test was applicable to the free exercise of religion defense. There are four elements in the Sherbert test: does the litigant have a sincere belief?; is the exercise of that belief burdened?; does the state have a compelling interest furthered by the law burdening the litigant?; and may that compelling interest be furthered by a less restrictive means?

At the time Jernigan was decided, freedom of religion as a part of the Bill of Rights was seen as a fundamental right. Therefore, a law burdening that freedom received strict scrutiny. Under the strict scrutiny framework, the parents in Jernigan were required to prove the sincerity of their beliefs, but the parents' sincerity was stipulated by the parties. Also, the parents were required to show that the teacher certification requirement burdened the exercise of their beliefs. Although not mentioned in the facts, the parents' religious beliefs could be interpreted as burdened since they were faced with either abandoning their religious beliefs by placing their children in public school or facing criminal prosecution for violating the compulsory attendance law.

Once the parents met their Sherbert test, the State of Alabama was responsible for showing that it had a compelling reason for burdening the Jernigans' exercise of religious freedom. In offering a compelling reason, the state has the burden of

142. Id. at 1246.
143. Id. at 1247.
146. In effect, if not in theory, Smith has stripped freedom of religion from its status as a fundamental right since the Court said it will no longer apply strict scrutiny to a freedom of religion defense when that is the sole defense raised by a litigant. See supra notes 52-75 and accompanying text.
147. NOWAK ET AL., supra note 109, at 816-17.
148. Jernigan, 412 So. 2d at 1245.
149. Id. at 1243-44.
150. Id.
151. See supra note 49.
152. Smith & Klicka, supra note 46, at 313-19. The article lists six elements, but this Note treats the last three as sub-elements of the third main element.
proof\textsuperscript{153} and must produce evidence to carry its burden of proof.\textsuperscript{154} Also, the state's claim is subject to strict judicial scrutiny.\textsuperscript{155} This strict scrutiny requires the state to show that its statute furthers a compelling state interest,\textsuperscript{156} that the law is essential to achieving that goal and is not merely a reasonable means of doing so,\textsuperscript{157} and that the law adopted is the least restrictive means available to achieve the state's legitimate goal of ensuring that children are adequately educated.\textsuperscript{158}

In assessing whether the Alabama compulsory attendance law burdened the Jernigans' ability to exercise their religious belief, the court imposed several requirements on the Jernigans. For example, the court stated that the defendants failed to demonstrate that compulsory education would tend to harm their children's "salvation."\textsuperscript{159} In imposing this requirement, the court seized upon the language in the stipulation of facts that the parents would commit a mortal sin if the children's religious salvation is endangered by public schooling.\textsuperscript{160} The court was influenced by the fact that in Yoder the Amish lifestyle manifested itself in outward dress, vocation, and recreational pursuits.\textsuperscript{161} In essence, the court was looking for the same external evidence of religious belief in the Jernigans' case.\textsuperscript{162}

The Alabama court's approach ignores the different ways various religious beliefs manifest themselves in lifestyles.\textsuperscript{163} A person's religious convictions may be sincere and yet not be exhibited by the same conduct as that practiced by the Amish because of a difference in doctrinal beliefs. Moreover, requiring the Jernigans to show their children's salvation would be

\textsuperscript{155} Hobbie, 480 U.S. at 141; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).
\textsuperscript{156} Yoder, 406 U.S. at 215.
\textsuperscript{160} Id. at 1242-43.
\textsuperscript{161} Id. at 1245. These three attributes are all characteristic of the Amish faith. See Yoder, 406 U.S. at 210-12.
\textsuperscript{162} Jernigan, 412 So. 2d at 1245. The court stated that "[u]nlike the Amish in Yoder, the defendants have not shown that their entire way of life is inextricable from their religious beliefs or that public schooling would substantially interfere with their religious practices." Id.
\textsuperscript{163} There are over 80 religious bodies in the United States, each with over 50,000 members. See U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 56-57 tbl. 77 (1990).
endangered by compulsory attendance in public schools goes to
the nature and sincerity of the Jernigans' beliefs which were not
at issue, not to the burden placed upon the exercise of that
belief.164 The proper inquiry in assessing the state's burden
should be whether the compulsory attendance law requires the
citizen to "abandon belief and be assimilated into society at large,
or be forced to migrate to some other...more tolerant
region."165 According to Yoder, a law that forces a choice creates
precisely the kind of objective danger that the Free Exercise
Clause of the First Amendment was designed to prevent.166
Since the Jernigans sincerely believed that they had the primary
responsibility for educating their children and that their children
should be brought up in a Catholic educational environment
unavailable in their geographic area other than in their
home,167 the court should have ruled that the Jernigans met
the burdens imposed by a strict scrutiny analysis.

The Alabama court wrongly required the Jernigans to prove
that home education by a parent who does not hold a teaching
certificate is equivalent in quality to public education.168 This
burden was not the Jernigan's; rather, the State of Alabama had
the burden of proving that a teacher certification requirement,
though it burdens a sincerely held religious belief, nonetheless
furthers a compelling state interest in the least restrictive way
possible.169

Because the State of Alabama was not required to meet its
constitutionally mandated burden of proof, Jernigan is weak
precedent and was wrongly decided. In Jernigan, the court found
that the parents' liberty, privacy, and family-integrity interests in
controlling the education of their children were not
unconstitutionally burdened by the compulsory attendance
law.170 The court also stated that "the defendants have not
demonstrated that they can and will continue to provide an
equivalent education, and it is not incumbent upon the State to

164. The parties had stipulated that the defendants' religious beliefs were sincere.
Jernigan, 412 So. 2d at 1245.
166. Id.
167. Jernigan, 412 So. 2d at 1243.
168. Id. at 1245.
169. See supra notes 151-58 and accompanying text.
170. Jernigan, 412 So. 2d at 1247.
verify the same."\textsuperscript{171} Yet the strict scrutiny standard properly applied to this issue is identical to the scrutiny in the free exercise claim since both involve fundamental rights, which means the state has the burden of proof.\textsuperscript{172} The parents need only prove that their fundamental right to direct the education of their children is burdened.\textsuperscript{173} The facts in the case indicate such a burden since the parents' choice of home education was prohibited by the teacher certification requirement.\textsuperscript{174} The state should have the burden to prove that the certification requirement is the least restrictive means available to further its goal of childhood education.\textsuperscript{175}

Although \textit{Smith} has changed the analysis for cases in which the free exercise defense is raised,\textsuperscript{176} strict scrutiny would still apply to the \textit{Jernigan} case since the parents raised both the free exercise defense and the right to privacy and freedom of liberty defense as well.\textsuperscript{177} \textit{Jernigan} represents a "hybrid case," as referred to by the majority in \textit{Smith}.\textsuperscript{178}

\section*{B. Florida}

As late as 1985, Florida parents desiring to teach their children at home were required to be private tutors meeting all the requirements prescribed by law and the regulations of the State Board of Education for private tutors.\textsuperscript{179} A private tutor was required to have a valid Florida teacher's certificate.\textsuperscript{180}

In \textit{State v. Buckner},\textsuperscript{181} the District Court of Appeal of Florida, in a rather terse opinion, reversed the trial court's ruling that the Florida compulsory school attendance law was impermissibly vague.\textsuperscript{182} The State of Florida prosecuted two families, each of which schooled their children at home.\textsuperscript{183} None

\begin{footnotesize}

\textsuperscript{171} Id.
\textsuperscript{172} See Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy is a fundamental right).
\textsuperscript{173} See supra note 49.
\textsuperscript{174} \textit{Jernigan}, 412 So. 2d at 1244.
\textsuperscript{175} See supra note 49.
\textsuperscript{176} See supra notes 52-75 and accompanying text.
\textsuperscript{177} \textit{Jernigan}, 412 So. 2d at 1246.
\textsuperscript{180} Id. at 1222 (Lehan, J., dissenting).
\textsuperscript{181} 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).
\textsuperscript{182} Id. at 1229-30.
\textsuperscript{183} Id. at 1231-32 (Lehan, J., dissenting).
\end{footnotesize}
of the parents was certified by the State as teachers, and therefore did not qualify as private tutors according to the State. The parents argued that their home school program was within the definition of private school. The trial court dismissed the criminal prosecution on the grounds that the compulsory school attendance statutes were unconstitutionally vague. The appellate court reversed and remanded. In an extensive dissent, Judge Lehan analyzed the Florida statute and agreed with the trial court that the statute was unconstitutionally vague. Perhaps motivated in part by Judge Lehan's dissent, the Florida legislature amended the law in 1985 to create a statutory scheme that allows parents to home school their children regardless of their own educational training.

The new architecture of this Florida law takes a two-pronged approach to home schooling parents. If the parent holds a valid Florida teaching certificate for the subjects or grades being taught, she is qualified to teach her children at home and need only comply "with any other requirements prescribed by the law or rules of the state." A parent who does not hold a valid Florida teacher's certificate must comply with several

184. Id. at 1232 (Lehan, J., dissenting).
185. Id. (Lehan, J., dissenting). The statutes did not explicitly define a private school, but stated that regular school attendance as required by law was met by attendance at a "private school supported in whole or in part by tuition charges or by endowments or gifts." Id. (Lehan, J., dissenting).
186. Id. at 1229. The trial court held that the statutes were worded in such a way that a person could not know whether her conduct subjected her to criminal liability. Id.
187. Id. at 1230.
188. Id. at 1230-43 (Lehan, J., dissenting). Judge Lehan criticized the majority for "appearing to place the unquestionably important educational interests of children, in their receipt of what may be perceived to be proper types of schooling, paramount over the constitutional due process interests of . . . the parents who are defendants in these criminal prosecutions" and for "engaging the courts in the creation of law in an area which [Judge Lehan believed] is unquestionably legislative." Id. at 1230-31. Judge Lehan applied several approaches in trying to interpret the Florida statute and concluded after much discussion that the statute "does not convey a 'sufficiently definite warning as to the proscribed conduct when measured by common understanding . . .' " Id. at 1242 (citations omitted).
189. 46 FLA. JUR. § 229.808 (2d ed. 1988).
190. The statute sets out specific requirements for both teacher-certified parents and nonteacher-certified parents.
191. FLA. STAT. ANN. § 232.02(4)(a) (West 1988). Generally, these other requirements include annual reporting to the Florida Department of Education required by § 229.808.
unique requirements, but need not have a certain level of educational training. Instead, the Florida law focuses on the educational development of the child. Generally, the noncertified parent must give notification to the county school superintendent of her intent to home school, maintain a portfolio of records and materials, and provide for an annual educational assessment documenting the child's educational progress. Should the child fail to progress at a level commensurate with her ability, the parent will be given a one year probationary period in which to correct the deficiency. Failure to get the child "back on track" will result in the loss of the right to home school.

The most recent attention given by the Florida legislature to the home schooling parent was in 1990. As part of the William and Bud Bell Prevention and Protection Act, designed to protect children and adults from abuse, the Florida legislature amended section 232.02(4) of the Florida code to prohibit home schooling by any parent or guardian who has been charged or convicted by a court of law for child abuse or neglect.

C. Georgia

In 1983, Terry and Vickie Roehmild were convicted for violating Georgia's compulsory school attendance law on the grounds that the Roehmild's practice of teaching their children at home did not constitute a permissible private school under Georgia law. The Georgia Supreme Court, however, found the compulsory attendance statute unconstitutionally vague and reversed the convictions. The court found that the statute was vague because its language, which permitted private schools

193. Id.
194. Id. § 232.02(4)(b)(1).
195. Id. § 232.02(4)(b)(2).
196. Id. § 232.02(4)(b)(3).
197. Id.
198. Id.
200. Id. § 1.
201. Id. § 26. This law was approved by the Governor on July 3, 1990. Id. § 78.
203. Id.
but did not define the term, was not "sufficiently definite to provide a person of ordinary intelligence, who desires to avoid its penalties, fair notice of what constitutes a 'private school.'"\textsuperscript{204}

In response, the Georgia General Assembly revised the compulsory school attendance law in 1984 and provided a framework for the operation of home study programs.\textsuperscript{205} The statute requires that the parent doing the teaching possess "a high school diploma or a general educational development (GED) equivalency diploma."\textsuperscript{206} Alternatively, the parent "may employ a tutor who holds at least a baccalaureate college degree."\textsuperscript{207} The home schooling parent must also complete attendance and progress assessment reports.\textsuperscript{208}

IV. TEACHER CERTIFICATION REQUIREMENTS

As noted above, there are several constitutional claims and defenses to compulsory attendance laws. As seen in the Alabama case of \textit{Jernigan v. State},\textsuperscript{209} a compulsory attendance law that requires all persons instructing children to be certified teachers can bar parents who lack this certification from home schooling their children. Because parents have a fundamental right to direct their children's education,\textsuperscript{210} a teacher certification requirement is subject to strict scrutiny when it prevents parents lacking such certification from home schooling their children.

The state's interest in education includes the right of the state to ensure that all children receive an education that will qualify them to participate effectively and intelligently in our political system.\textsuperscript{211} If a court finds that the state's interest is not compelling, then any requirement in a compulsory attendance law that burdens a parent's right to direct her children's education is invalid.\textsuperscript{212} On the other hand, if a court finds that

\textsuperscript{204} \textit{Id.} at 158.
\textsuperscript{206} \textit{Id.} § 20-2-690(c)(3).
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.} § 20-2-690(c)(6). Specifically, the parent must keep attendance reports and submit them at the end of each month to the local school superintendent, \textit{id.}, and must write an annual progress assessment report on each student's academic progress. \textit{Id.} § 20-2-690(c)(8).
\textsuperscript{209} 412 So. 2d 1242 (Ala. Crim. App. 1982).
\textsuperscript{210} See supra notes 80-103 and accompanying text.
\textsuperscript{211} See supra notes 15-33 and accompanying text.
\textsuperscript{212} See Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the
the state's interest is compelling, then any law that furthers the state's interest while burdening a parent's fundamental right must be the least restrictive law available that retains the ability to carry out the state's interest.213

A teacher certification requirement is not the least restrictive means available to carry out the state's interest in education.214 Since the state's interest is in ensuring the education of its children, progress toward this goal could be measured by standardized testing of all students in nonpublic schools, as in public schools.215 Such a testing program allows the state to monitor progress toward education, yet does not interfere with a parent's right to home school her children.216 Florida and Georgia statutorily require such testing of the children of noncertified home schooling parents.217 Alabama has no testing requirement in its compulsory attendance statute.218

Further, teacher certification has not resulted in students enrolled in public school achieving greater academic success than that of home schooled children.219 Thus, assuming that the state has a compelling interest in the education of its children, one could argue that the teacher certification requirement does not qualify as a means necessary to achieve that end.220

Since neither the Georgia nor Florida compulsory school attendance laws require a home schooling parent to be a certified teacher, they do not pose the risk of unconstitutionally burdening

213. Id.
214. This is readily seen when one considers that a nonteacher-certified parent desiring to home school is barred from doing so by a requirement that she be teacher-certified, but is not barred from teaching by a law requiring that her child-student take periodic standardized tests to measure educational progress.
216. Id. at 733.
219. See Baker, supra note 4, at 836 ("The current system . . . of governmental controls . . . has produced unprecedented academic failure . . . .").
220. To burden a fundamental right constitutionally, a state law must be a necessary means of achieving a compelling state goal. Given that certification of public school teachers has failed to produce greater academic success in public school students than have nontcertified teaching parents in their home schooled children, one could hardly argue that teacher certification is a necessary means for achieving the education of children.
the parent's right to home school. In Alabama, however, there is a potential for the statute to be unconstitutional as applied. For example, a parent wishing to home school may permissibly do so even if she is not a certified teacher as long as the home school is operated as a church school. But a problem arises when, in cases like Jernigan, there is no church school available in the area that is of the same religious belief as that of the parents wishing to engage in home schooling. In such a situation, the only alternative under Alabama law is to use the private tutor alternative, which requires that the parent be a certified teacher. Thus, a parent lacking a teaching certificate must choose either to violate the compulsory attendance law or give up a fundamental right. This choice infringes a parent's fundamental right to free exercise of religion and to direct the education of her children.

V. DISCRETIONARY DECISION BY SCHOOL OFFICIALS

When governmental actions deprive a person of liberty, due process requires that the decision to take away that liberty be made by a neutral and detached decision-maker. Alabama law requires that a private tutor must hold "a certificate issued by the state superintendent of education" before that tutor may offer private instruction within the meaning of the private tutor alternative to public education. The Alabama statute, however, does not define what kind of certificate the tutor is required to hold, nor the criteria that must be met to be certified. Evidently, under Alabama Code section 16-28-2, the State Superintendent has "wide discretion" to establish the criteria for such a certificate.

221. See supra notes 179-208 and accompanying text.
222. Ala. Code § 16-28-1(2) (1987). A church school must be a part of a "ministry of a local church, group of churches, denomination and/or association of churches." Id.
223. Id. § 16-28-5. That this is the only alternative assumes that there is no private school in the vicinity able to meet the educational criteria of the parents.
224. See supra notes 165-66 and accompanying text; see also Dorman, supra note 215, at 733 (analyzing Michigan's teacher certification requirement in light of constitutional principles and concluding that its application to religiously motivated home schooling parents violates their constitutional rights).
227. The court in Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982), recognized that a private tutor must hold a certificate equivalent to that held by those teaching public schools, but did not cite any authority for that conclusion.
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Because a parent lacking teacher certification requirements must apply to the State Superintendent of Education for a certificate, it follows that the Alabama State Superintendent is in a position to deprive a parent from exercising her fundamental liberty interest in directing her child's education. The Superintendent can require that all private tutors possess certain teaching-related degrees before qualifying for certification as a private tutor. Because such a rule deprives a parent lacking a specific educational background from exercising certain fundamental rights, the parent is entitled under due process of law to have such a decision made by a neutral and detached decision-maker. Arguably, because public schools receive funding in proportion to the number of students in attendance, the State School Superintendent is not detached and may not be neutral. Furthermore, the requirement that a private tutor possess credentials equivalent to that possessed by a public school teacher may not be rationally related to the express purpose of the school attendance statute. Alabama has stated that the purpose of its school attendance law is to "secure the prompt and regular attendance of pupils and to secure their proper conduct." A teacher certification requirement may not affect the number of students in attendance or have any effect on their conduct. Therefore, a teacher certification requirement may not be rationally related to the express purposes of the Alabama school attendance law.

Conclusion

Parents have several constitutional rights supporting their decision to choose alternatives to public education, and those who choose home education as an alternative may be barred from

228. See supra notes 107-10 and accompanying text.
229. See Smith & Klicka, supra note 46, at 325-27.
   The purposes of this chapter are to secure the prompt and regular attendance of pupils and to secure their proper conduct, and to hold the parent, guardian or other person in charge or control of a child responsible and liable for such child's nonattendance and improper conduct as a pupil, and to effect these purposes the chapter shall be liberally construed and the courts and those charged with the enforcement of its provisions are vested with a wide discretion in its administration.
   Id. (emphasis added).
carrying out that choice by teacher certification requirements. These requirements arguably pose an unconstitutional burden on the parents’ freedom of choice concerning their child’s education.

State compulsory attendance statutes in Florida and Georgia give parents sufficient freedom to home school their children in a constitutional manner. However, the Alabama statute requiring teacher certification of private tutors may be unconstitutional as applied and may not be rationally related to the express purposes of the Alabama school attendance law.

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