MOVING AGAINST THE TIDE: AN ANALYSIS OF HOME SCHOOL REGULATION IN ALABAMA

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[1]

I. INTRODUCTION

Parents face difficult decisions as they raise their children—some of the most important of which deal with their children's education. Amid reports of declining test scores, debates over teacher performance standards, and the belief—be it based in fact or mere perception—that schools are not safe, parents have begun to explore alternative methods of ensuring that their children receive a quality education.[2] One such method of education that is firmly rooted in American history[3] is home schooling, that is, a form of schooling whereby children receive their formal education from parents, guardians, or relatives at home. The past ten years have seen a steady rise in the number of parents who elect to educate their children in the home.[4] The motivations behind this increase in home schooling include parents' desire to provide their children with a religious, as well as secular, education, a lack of the financial resources for private school tuition, and an opinion that public schools are inadequate fora for proper education.[5]

The parents, however, are not the only interested parties when it

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1. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

2. *See* Jennie F. Jakestraw, An Analysis of Home Schooling for Elementary School-Age Children in Alabama 112-13 (1987) (unpublished Ph.D. dissertation, University of Alabama) (on file with the University of Alabama Education Library) (discussing reasons given by parents for choosing to home school their children).

3. *See* CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION xiv (1995) (noting that a large number of America's great leaders are products of home schooling).

4. CHERYL GORDER, HOME SCHOOLS: AN ALTERNATIVE 10 (4th ed. 1996) (observing a 25% annual increase in the number of home schooled children since 1990).

5. Mark Murphy, *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, 458 (1992).

comes to the decision to home school. The state in which that family resides also has a legitimate interest in overseeing the education of its citizenry.[6] Additionally, the child who is to receive the education—be it at home or elsewhere—obviously has an interest, and may be the most important interested party of all.

The legal debate between the interested parties does not occur in a vacuum. Important social and political issues constantly abide on the periphery of any such legal debate and must be acknowledged before a discussion of the legal challenges can be undertaken. For example, state and federal funding for local public education often depends on the number of students enrolled in a district's schools.[7] Therefore, the local school board's budget may be decreased if a number of families in the district elect to home school their children.[8] Public school teachers and their unions have also expressed an interest in the parent's decision concerning home schooling by noting "that home schooling programs cannot provide the student with a comprehensive education experience."[9] Philosophical differences between public school officials/teachers and the parents who decide to educate their children in the home also factor into the debate.[10] Such a debate often revolves less around whether the child receives an education and more around which method will be utilized to achieve that end.[11] But the motivations behind the positions of the various proponents and opponents of home schooling merely provide the backdrop for the confrontation that arises in courts and administrative hearings over a parent's right to home school his or her children.

Challenges to a state's statutory scheme for regulating home schools typically involve several constitutional issues. One common theme found in many home school cases is the First Amendment right

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6. *Yoder*, 406 U.S. at 213 (noting a state's "high responsibility for education of its citizens.").

7. For the 1995-96 fiscal year, for example, local school boards in Alabama budgeted $5,100 per student; approximately $4,000 of that $5,100 was received from state and federal sources. STATE OF ALABAMA DEPARTMENT OF EDUCATION ANNUAL REPORT, BULL. 1996, NO. 2, STATISTICAL AND FINANCIAL DATA FOR 1995-96, 71-75 (1996).

8. KLICKA, *supra* note 3, at 21-22. For the potential impact that decreased funding may have on a school board's discretionary authority regarding approval of home schooling see *infra* text accompanying notes 80-96.

9. *The National Education Association 1991-92 Resolutions*, THE NEA TODAY, Sept. 1991, at 19. Also of note are the concerns raised by opponents of home schooling regarding the socialization of the children who receive their education from their parents. *See* ALAN THOMAS, EDUCATING CHILDREN AT HOME 111-12 (1998); *but see* KLICKA, *supra* note 3, at 15 (noting that many home school families within various communities make a concerted effort to organize social activities among the home schooled children in order to counteract any potential deficiency in their children's social development.).

10. *See* KLICKA, *supra* note 3, at 22-26.

11. *See id.* at 21.

of freedom of religion.[12] While this issue often undergirds the dispute between the state and the parent, this Comment will not address First Amendment arguments specifically.[13] This Comment will, however, analyze the status and potential areas of contention found in the current method used to regulate home schooling under the laws of Alabama. Because the issue of parental rights in the home schooling of children has not been litigated often in Alabama,[14] the majority of the analysis will focus on potential challenges to Alabama's statutes in light of various challenges to home schooling statutes in other states. Part II discusses whether, under both the United States Constitution and Alabama law, there is a fundamental right to an education, and provides an analysis of the appropriate level of scrutiny that should be applied to regulations involving home schooling. Part III provides an overview of the current system for regulating home schooling in Alabama. Part IV discusses three common challenges to home schooling statutes. The first challenge is based on the procedural due process right to a neutral, detached magistrate, which can arise when a local or state school board official has the discretion to approve or deny a parent's attempt to home educate his or her children. The second challenge involves the statutory requirement that parents in home schools have a teacher certification, which is usually issued by a state governmental entity. Finally, Part IV examines the due process challenges made by home school parents based on the assertion of a fundamental right to educate their children. Part V will provide recommendations for striking a balance between the state's interest in education and the parental rights involved.

II. Is Education a Fundamental Right?

In order to analyze the various challenges to home school regulations, one must first understand how the Supreme Court of the United States has addressed educational rights under the U.S. Constitution. While the debate over home school regulation could be easily resolved

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12. U.S. CONST. amend. I; *see, e.g.*, Delconte v. State, 329 S.E.2d 636 (N.C. 1985); *cf.*, New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (involving a small religious school's refusal to comply with state law requirements for state approval of the school's curriculum), *cert. denied*, 494 U.S. 1066 (1990).

13. For a thorough analysis of various First Amendment issues involved in home schooling statutes and litigation, see, *e.g.*, Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987); Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818 (1992).

14. One case involving Alabama's statutory scheme for regulating home schooling is *Jernigan v. State*, 412 So. 2d 1242 (Ala. Crim. App. 1982). For additional discussion of this case in the context of a survey of home schooling statutes in the Southeast, see Murphy, *supra* note 5, at 473-79.

if a constitutionally-based fundamental right to an education existed, no such right has yet been held to exist.[15] Rather, the Supreme Court, through a series of cases involving the regulation of public and private schools, has addressed both the right to an education and parental rights in overseeing the education of their children.[16] Although home school parents have asserted numerous constitutional rights in their challenges to home schooling statutes enacted by states,[17] the Supreme Court of the United States has never ruled directly on a statute that regulates home schooling. Consequently, in order to analyze the various challenges to home school regulation, it is important to first understand how the Court has addressed educational rights under the Constitution. After analyzing the Court's view of the competing interests, the important determination of the appropriate level of scrutiny that a court would apply to such challenges can be surmised.

A. Parents and the State: Conflicting Interests?

The leading case that directly addressed the question of whether there is a fundamental right to an education exists under the U.S. Constitution is *San Antonio Independent School District v. Rodriguez*.[18] In *Rodriguez*, the Supreme Court of the United States examined Texas' statutory scheme for public school funding, specifically the disparity in funding that went to various school districts within the same geographic area.[19] The appellees asserted that the disparate funding, a consequence of the use of the property tax to fund schools, violated the fundamental rights of children in lower income areas to receive an education.[20] The Court, however, declined the opportunity to hold that education is an explicit or implicit fundamental individual right under the Constitution,[21] applying instead a rational basis test to the funding

15. *See infra* text accompanying notes 18-23.

16. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

17. Typical challenges involve the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. Other issues that have been raised include privacy rights under the Fourth Amendment, and Ninth Amendment claims involving state sovereignty. Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1921 (1996).

18. 411 U.S. 1 (1973).

19. *Rodriguez*, 411 U.S. at 6-17.

20. *Id.* at 16-17. The District Court agreed with the appellees' assertion that the Texas system of funding public schools "imping[ed] upon a fundamental right explicitly or implicitly protected by the Constitution . . . ." *Id.* at 17.

21. *Id.* at 35. It is important to note that in the context of public schools only, the Court has noted that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954). This language indicates that once a state has taken

scheme. Consequently, the Court held that the funding scheme need only "bear some rational relationship to legitimate state purposes" in order to survive a constitutional challenge.[22] With this lowest tier of scrutiny established for education, states can easily justify most education laws; such laws generally take the form of compulsory attendance statutes.[23]

The state's interest in education, however, must operate in concert with another important interest: the parents' right to oversee the upbringing of their children. Two noteworthy opinions from the 1920s addressed the issue of parental rights regarding the education of their children. In *Meyer v. Nebraska*,[24] the Court heard a challenge to a state law that forbade the teaching of a foreign language to any child prior to enrollment in the eighth grade. The petitioner was a teacher who taught German to children in their homes.[25] Justice McReynolds held that the statute violated the parents' due process rights under the Fourteenth Amendment[26] and the Court subsequently held that the statute was unconstitutional.[27]

Two years later, in *Pierce v. Society of Sisters*,[28] the Court again addressed the extent of a parent's right to control his or her child's education. In *Pierce*, appellees, operators of private schools, sought injunctive relief from an Oregon law requiring compulsory school attendance for children between the ages of eight and sixteen.[29] Justice McReynolds, writing for the Court, held that required attendance of children in public schools violated the rights of the parents to oversee the upbringing and education of their children.[30] In an often quoted portion of the opinion, Justice McReynolds stated that "[t]he 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

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steps to educate the children within its borders, equal protection demands a different level of scrutiny. Therefore, not all education laws will automatically be subjected to the lowest tier of judicial scrutiny.

22. *Rodriguez*, 411 U.S. at 40.

23. *See, e.g.*, ALA. CODE § 16-28-2.1 (1995).

24. 262 U.S. 390 (1923).

25. *Meyer*, 262 U.S. at 396-97.

26. *Id.* at 400-02.

27. *Id.* at 403. The Court pointed to the fundamental rights of the teacher, the students, and the parents, and then noted that the statute had *no* rational relation to the professed goal of educating the children of Nebraska. *Id.* at 401-02.

28. 268 U.S. 510 (1925).

29. *Pierce*, 268 U.S. at 530. The statute did allow for certain exemptions from compulsory public school attendance; such allowances were made for disabled students, private instruction (i.e., home schooled students), and students who lived a great distance from the closest public school. *Id.* at 531.

30. *Id.* at 534-35.

prepare him for additional obligations."[31] Like *Meyer*, *Pierce* demonstrates the parent's fundamental right in not only the rearing of his or her children, but also the right in overseeing their education.

The Court's failure to hold educational rights as fundamental, coupled with its recognition of a parent's right to oversee his or her child's education, has resulted in a tension between the state's and the parent's rights and obligations. Some states have attempted to resolve this tension by enacting state laws or constitutional provisions that grant each child a right to an education.[32] These states demonstrate a focus on the third interested party involved in the home school debate: the child. Thus, while *Rodriguez* stated that there was no fundamental right to an education, several states, including Alabama, recognize such a right either under their state constitutions or by a judicial ruling.[33] It is not the child, however, who is held accountable for failing to comply with the compulsory attendance law, rather it is the parents under many states' laws, who bear the burden of compliance with those laws,[34] or they may be subject to criminal prosecution.[35] So even when a state focuses on the child, the state and the parents are intricately involved in the oversight of the educational right. After establishing the obligations and rights for all interested parties, it still appears that Alabama (and other states that grant a right to an education) recognizes that each child has a right or entitlement to an education, which brings any denial of such a right or entitlement under the umbrella of the Due Process Clause found in most state constitutions.[36]

B. Appropriate Level of Judicial Scrutiny

With one rarely-used exception,[37] the Supreme Court generally utilizes a two-tier system for analyzing a state action when a claimant asserts a violation of either procedural or substantive due process rights.[38] If a fundamental right is involved,[39] the Court will apply a

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31. *Id.* at 535.

32. *See* KLICKA, *supra* note 3, at 160-63.

33. *See, e.g.*, C.L.S. v. Hoover Bd. of Educ., 594 So. 2d 138, 139 (Ala. Civ. App. 1991) (holding that an education is an entitlement of every child).

34. ALA. CODE § 16-28-2.1 (1995).

35. *Id.*

36. *See, e.g.*, ALA. CONST. art. I, § 6.

37. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (utilizing an intermediate level of scrutiny which applies an "undue burden" test on state actions regarding abortion).

38. Procedural due process guarantees a citizen that "[w]hen the power of the government is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action" and "[i]f life, liberty or property is at stake, the individual has a right to a fair procedure." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1, at 487 (4th ed. 1991). Substantive due process claims require that "courts use the concept

"strict scrutiny" review of the state action and require that two things be demonstrated: a compelling state interest and a relational showing between the means and the desired ends.[40] Accordingly, in order for a statute to survive this level of scrutiny, it must support a compelling state interest, and *also* be related to achieving that purpose where no less restrictive action would do so. Therefore, when the challenge involves only a parent's right to oversee and dictate the education of his or her children, then a fundamental right belonging to the parent is involved and strict scrutiny would be given to the state law in the context of a Fourteenth Amendment due process claim, effectively making it nearly impossible to pass constitutional muster.[41] If, however, no fundamental right is involved, then the state only has to show that the action supports a legitimate objective and is rationally related to the achievement of that objective.[42] Therefore, a case involving a claim asserting a general right to an education under the federal constitution requires only a determination that the state education statute be rationally related to the purposes espoused by the state, since there is no fundamental right to an education in the federal constitution.[43]

What level of scrutiny should be applied in due process challenges to a state's regulation of home schools, specifically compulsory attendance laws that inhibit home education? This question is not well-settled and largely depends on the claims asserted in a particular challenge and the specifics of the statute at issue. One interesting and somewhat compelling position is that the seldom-used "middle tier" of undue burden scrutiny be applied to such a challenge that "[i]f a court determines that a law does not present an undue burden, it is to consider the law under the rational basis standard; but if a statute does create an undue burden, the court should apply strict scrutiny analysis."[44] The middle tier of scrutiny provides a court with the opportu-

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. . . to review the ability of government to restrict the freedom of action [regarding life, liberty, or property] of all persons." *Id.* § 11.4, at 369.

39. Some scholars have observed that the current Court recognizes a relatively small number of fundamental rights that are not directly stated in the Bill of Rights: freedom of association, voting, interstate travel, fairness in the criminal process, procedural fairness for governmental deprivations of life, liberty, or property (i.e., procedural due process), and privacy. It is under the fundamental right to privacy that scholars and the Court have placed the right of parents to oversee the upbringing of their children. *Id.* § 11.7, at 393-94.

40. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

41. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that a parent has a fundamental right to oversee the upbringing and education of his or her child).

42. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

43. *See Rodriguez*, 411 U.S. at 37.

44. *See* Jon S. Lerner, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 368 (1995). Lerner does note, however, that most courts have applied only a rational basis standard when assessing state home schooling statutes. *Id.* at 363-64. The benefit of the middle tier "undue burden" approach is that it allows the court to balance

nity, assuming a petitioner asserts a federal Due Process claim, to examine the burden of a state home school law on a particular parent before deciding whether to apply strict or rational basis scrutiny. Since uncertainty exists as to the appropriate level of scrutiny used for a challenge to home school regulation, a clear understanding of the applicable statutory scheme must be attained in order to better predict the outcome of a challenge to that scheme.

III. CURRENT EDUCATION STATUTES IN ALABAMA

A. Alabama's Statutory Scheme for Regulating Home Schools

Regulation of home schooling throughout the United States can be categorized into three distinct approaches.[45] The first approach is a constitutional provision that gives the state the power to regulate *only* public schools.[46] The second, slightly stricter, approach involves states enacting statutes that expressly allow for home schooling but also provide for some form of state approval or notification by the parents to the local school board.[47] The strictest approach requires state permission to home school and certification of home school teachers.[48]

Alabama law combines various elements of the second and third approaches, depending on the circumstances surrounding each particular home school family. In certain circumstances, Alabama's statutory scheme falls into the second approach when the home schooling family is affiliated with a church, thereby falling under the definition of a "church school."[49] If the home school teacher is not affiliated with a church, however, Alabama law imposes significant requirements on home school teachers.[50] Consequently, Alabama's regulation is fairly unusual in that it combines elements of various schemes and creates a system that is lenient on certain prospective home schooling families, yet quite strict in its regulation of others. In order to understand this dichotomy, a full analysis of the statutes and how they interrelate is required.

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competing interests (parental rights and the state's interest in education) as the Court did in *Casey* (a woman's interest in freedom to terminate a pregnancy and state's interest in protecting fetal life). *Id.* at 365.

45. *See* KLICKA, *supra* note 3 at 156-62.

46. *See* OKLA. CONST. art. 13, § 5. With no power to regulate private, church, or home schools, there are no grounds for challenges to home schooling. *See* KLICKA, *supra* note 3, at 161-62.

47. *See* KLICKA, *supra* note 3, at 156-59.

48. *See id.* at 160-61.

49. *See* ALA. CODE § 16-28-1(2) (1995).

50. *See id.* § 16-28-5.

The easiest approach for home schooling in Alabama is for families to utilize a provision that allows them to affiliate with a church, thus avoiding much of the regulation by local school superintendents. A "church school," under Alabama law, includes any school that provides instruction to students in any grades between kindergarten and the twelfth grade and is "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."[51] Beyond this definition, no other requirements are promulgated for church schools. If a family wishing to home school obtains support from a church (or group of churches), then that family can simply begin instruction with no other interference from the state.

For Alabama families who want to home school their children but are not affiliated or supported by a church, there are more obstacles to home schooling. These families will have to rely on the "private tutor" exception[52] to the state compulsory attendance laws.[53] Under this exception, a person can be classified as a private tutor if he or she has been issued a certificate by the State Superintendent of Education and offers instruction for at least 140 days per calendar year in the courses required to be taught in the public schools.[54] Therefore, if a parent has a high school diploma or non-education related college degree and wants to educate his or her child at home, he or she may have a difficult time receiving the certification required to be qualified as a private tutor.

The two aforementioned approaches to home school regulation under Alabama law allow for significantly different treatment for families who hope to home school their children. Essentially, there are two restraints imposed on other types of schools (including home schools under the classification of "private tutor") that are not applied to church schools. First, church schools are exempt from the requirement placed on other types of schools to make attendance reports to the state

51. *Id.* § 16-28-1(2).

52. *See id.* § 16-28-5.

53. *See id.* § 16-28-3. This statute makes it mandatory for all children between the ages of seven and sixteen to receive instruction from one of the following: public school, private school, church school, or private tutor.

54. ALA. CODE § 16-28-5. There is also a requirement that private tutors use the English language while teaching, which could easily deter newly arrived immigrants or temporary residents who hope to home school their children from trying to qualify as a private tutor. This requirement could particularly impact internationals employed in Alabama's two international automotive manufacturing facilities whose children's education could be inhibited during their residency in Alabama. While no challenge has yet been made concerning temporary residents, Alabama's home schooling policy could infringe on a non-English speaking child's entitlement to an education.

Superintendent of Education.[55] Second, all teachers, except those teaching at church schools, are required to be certified by the state Superintendent of Education.[56] This second requirement is the key difference in the approach Alabama takes in its treatment of church-affiliated home school families and those home school families who are not affiliated with a church. These added restraints, as demonstrated below, on home school families not affiliated with a church can effectively lead to disparate treatment.

B. Demonstration of Disparate Treatment

A hypothetical situation involving two families illuminates the disparate treatment non-church affiliated home school families receive under Alabama's education statutes. The Smith and the Jones families, who live next door to each other in an Alabama town, have school-aged children and want to educate their children at home. The Smiths intend for Mrs. Smith to provide the instruction to their children, while in the Jones home, Mr. Jones will be the primary teacher. Both Mrs. Smith and Mr. Jones have completed their education through the secondary level and have high school diplomas.

The Smiths hope to home educate their children out of a concern that the public school system cannot provide the religious influence that they want their children to receive on a daily basis. The Smiths are very active in their local church and have asked their church to sponsor and oversee their efforts to home school their children. If the church agrees to support the Smiths, they are ready to begin home schooling under the definition of a "church school" and are not required to make any reports to the state, nor are they required to obtain any type of certification from the state.[57] In addition, the Smiths will not be required to file any enrollment reports with the State Superintendent of Education.[58] They also avoid a potential criminal prosecution for violating Alabama's compulsory school attendance laws due to their classification as a "church school."[59] Consequently, the state has no mechanism for monitoring its interests in an educated citizenry.

For the Jones, however, the process is not so easy. The Jones family does not attend a church regularly and they seek to home school their children due to a belief that the public school system is an inadequate forum for providing a quality education. In order for Mr. Jones

55. *See id.* § 16-28-7.
56. *See id.* §§ 16-23-1, -28-5.
57. *See id.*, §§ 16-28-3, -7, -8.
58. *See id.* § 16-28-7.
59. *See* ALA. CODE § 16-28-12.

to begin instruction, he must apply for a teacher's certificate from the State Superintendent of Education.[60] An applicant for a certificate generally must have a college degree and must receive certain educational training.[61] In addition, Mr. Jones will have to file a statement with the local superintendent of education that lists the subjects to be taught and the period of time such instruction will take place.[62] He will also have to keep a register of the students' work and an attendance register, which the state can review at any time.[63] Should Mr. Jones endeavor to educate his children at home without complying with all of these obligations, he can be prosecuted for violating the state compulsory school attendance laws, sentenced to up to ninety days in the county jail, and required to pay a $100 fine.[64]

C. An Alabama Case Demonstrating Disparate Treatment

As the above hypothetical situation demonstrates, Alabama law places very different requirements on prospective home schooling families based merely on the affiliation, or lack thereof, with a church.[65] *Jernigan v. State*,[66] a case involving a challenge to the Alabama statutory system for regulating home schooling, demonstrates the disparity in treatment. In *Jernigan*, the appellants, parents who home schooled their children, were convicted of refusing to comply with the compulsory attendance laws on the basis that the mother was neither qualified as a private tutor (she had a high school diploma), nor was she affiliated with a specific church.[67] While the family based it primary argument on religious freedom concerns,[68] this case demonstrates the obstacles a non-certified parent in Alabama must overcome in order to educate his or her child in the home. The *Jernigan* court focused on the fact that the home schooling parents could not justify being exempt from compulsory attendance laws because they could not demonstrate that "the home education they practice is an adequate substitute or re-

60. *See id.* § 16-28-5.

61. *See* ALA. ADMIN. CODE r. 290-3-2-.01 to .07 (1999).

62. ALA. CODE § 16-28-5.

63. *Id.*

64. *Id.* § 16-28-12.

65. There can be numerous reasons for the lack of challenges to this scheme. One could be that many home schooling families in Alabama are affiliated with a church. Another reason could be that some challenges may have been handled in an administrative manner by school superintendents. But with funding for education being such a hotly debated political issue and with the increase in home school students, the potential for future challenges could be significant. Furthermore, the potential for criminal liability of parents under the compulsory attendance laws may bring future challenges.

66. 412 So. 2d 1242 (Ala. Crim. App. 1982).

67. *Jernigan*, 412 So. 2d at 1243-44.

68. *Id.* at 1243.

placement" for public education.[69] The court proceeded to apply a rational basis test to the state regulation requiring certification and, in doing so, took a narrow interpretation of U.S. Supreme Court holdings involving parents' control over the education of their children.[70] Had the Jernigan's been affiliated with a specific church, the state arguably would have had no basis for the prosecution, yet the mere lack of an affiliation facilitated a criminal prosecution of the parents.[71] This case demonstrates the significantly different treatment that parents receive from the state purely based on affiliation (or lack thereof) with a church. The focus, therefore, appears to be less on the quality of the education, and more on the method utilized by the parents to establish their home school. But as *Jernigan* illustrates, the type of and grounds for a challenge to home schooling statutes will dictate the scope of a court's inquiry into the legitimacy of those statutes,[72] this Comment now turns to the viability of common challenges to home schooling regulation.

IV. Potential Challenges to Alabama's Regulation of Home Schooling

There are several potential challenges to Alabama's statutory scheme for regulating home schools. One might challenge the method used by the State to approve private tutors. Since the state Department of Education oversees other areas of the education system, such as funding, one could argue that the Superintendent is not the neutral decision-maker needed to satisfy the procedural due process requirements of the Fourteenth Amendment. Another potential vulnerability lies in the issue of teacher qualifications and certification. This issue raises policy concerns surrounding the goal of education—does the state merely seek to ensure that education is received, or does it also seek to ensure that an education is received in a certain manner? A final potential challenge involves substantive due process. One could argue that a parent's fundamental right to control the education of his or her child has been infringed upon by a state action without due process of the law.

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69. *Id.* at 1245.

70. *See id.* at 1246 (applying the holding of Wisconsin v. Yoder, 406 U.S. 205 (1972)).

71. *See Jernigan*, 412 So. 2d at 1246.

72. *See id.* at 1246, 1247.

A. Neutral, Detached Magistrate or Decision-Maker

One feature of Alabama's home schooling statutory scheme that may be vulnerable to challenge is that of the role of the state Superintendent of Education and, to a lesser degree, the role that the local superintendents play in certifying teachers. The likely challenge would be one based on a violation of the parent's procedural due process rights—specifically, a parent could request that a court review the procedure afforded in order to determine whether or not the decision-maker was biased or partial to one outcome over another. If the government seeks to infringe upon a citizen's liberty, it "always has the obligation of providing a neutral decision-maker—one who is not inherently biased against the individual or who has personal interest in the outcome."[73] Therefore, when a person has a liberty or property interest at stake, he or she is entitled to a procedure in front of a neutral decision-maker at the first level of hearing under the Due Process clause in the Fourteenth Amendment to the U.S. Constitution.[74] Such a right is not limited to situations where criminal charges are at issue, but rather encompasses both civil and criminal cases.[75] In addition, the right is not limited to judicial proceedings—it includes administrative proceedings as well.[76] Under Alabama law, each prospective "private tutor" must receive a certificate issued by the State Superintendent of Education and must submit a statement to the local superintendent addressing both the method of teaching and the subject matter to be taught.[77] Both the state and local superintendents could potentially be seen as non-neutral decision-makers. An additional procedural due process concern could be the issue of notice to the parents of what is required to become a certified teacher. While the initial approval of a private tutor is the certification by the state Superintendent, the statute does not provide parents with guidance on what is required of them to

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73. NOWAK & ROTUNDA, *supra* note 38, § 13.1, at 488. The right to a neutral, detached decision-maker is but one consideration in the context of procedural due process. The overall review of procedural due process requires the following larger considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

74. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

75. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

76. *See* Winthrow v. Larkin, 421 U.S. 35, 46-47 (1975) (citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973)).

77. ALA. CODE § 16-28-5 (1995).

obtain certification.[78] The real problem for parents, however, rests with the potential financial interests of state and local superintendents.[79]

The United State Supreme Court addressed the dangers of possible financial interests affecting the decisions of magistrates and judges in *Ward v. Village of Monroeville*.[80] The Court in *Ward* heard a challenge to a town mayor acting as a traffic court judge and assessing fines that would go directly to the town's financial accounts.[81] The Court viewed the dual roles assumed by the mayor as a violation of the traffic offender's procedural due process rights since the "'possible temptation may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's [traffic] court."[82] The Court also addressed the argument that an incentive to convict by the mayor may be counterbalanced, for procedural due process purposes, by the possibility of reversal on appeal.[83] On this issue, Justice Brennan pointed out that "the State's trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."[84]

Thus, for Alabama home school parents, the argument that a court will eventually handle any challenges to a superintendent's ruling on either private tutor certification or enforcement of compulsory attendance laws generally is not a valid one. As one court pointed out, "local school boards have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid."[85] Certainly an argument can be made that a decision regarding a

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78. *Id.* While the meaning of "certificate" in this section could be seen as the same certificate private school teachers must obtain under section 16-28-1(1), this is uncertain. It is also uncertain, from the face of the statute, whether the private tutor certification has different requirements than public or private school teacher certification. The issue of teacher certification is addressed *infra* Part IV.B.

79. Under Alabama's compulsory attendance law, the parents are criminally accountable if their child does not attend a public, private, or church school. ALA. CODE § 16-28-2.1. The local board of education and juvenile courts are charged with enforcing this provision. *Id.* Yet, for each student that does not enroll in the local public school, the school loses a significant amount of money, so enforcement of compulsory attendance laws rests with parties who clearly have a financial interest. Merely having such a "prosecutorial discretion" does not "immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall*, 446 U.S. at 249.

80. 409 U.S. 57 (1972).

81. *Ward*, 409 U.S. at 57-58.

82. *Id.* at 60.

83. *Id.* at 61-62.

84. *Id.*

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

child's education should be made with more neutrality and process than one involving a traffic violation, which the Court in *Ward* held required a neutral, detached decision-maker.[86] The long-term importance of a decision made by a state administrator regarding a child's education presents a good argument for removing the local and state officials entirely from the role of having final approval of home schools.[87]

While a challenge based on procedural due process grounds may appear speculative, several other states have addressed such a challenge to their home schooling statutory scheme. In *Jeffery v. O'Donnell,*[88] home school parents challenged the discretionary authority given to school superintendents to approve private tutors.[89] This case validates one aspect of the Alabama scheme in that one of the problems that the *Jeffery* court found with the private tutor approval was that each school district had the power of approval,[90] whereas in Alabama, the approval (or certification) power is centrally located with the State Superintendent of Education.[91]

Another case involving a challenge to a statute requiring approval of home schooling is *Care and Protection of Charles*.[92] As was the case in *Jeffery*, the challenge in *Charles* dealt with a local school board's approval of home schools. The Massachusetts Supreme Judicial Court ruled that approval by school boards of home schooling curricula was not a violation of procedural due process.[93]

With *Jeffery* and *Charles* in mind, it appears that claims of violations of procedural due process based on the lack of a neutral, detached decision-maker would be difficult to prove. Since the certification procedures (to be discussed below) are determined by administrative regulations[94] and not merely on the discretion of the state superintendent, the potential impartiality based on financial or philosophical motivations would be very difficult to demonstrate.[95] A more likely challenge

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86. *Ward*, 409 U.S. at 61-62.

87. For this and other recommendations, see *infra* Part V.

88. 702 F. Supp. 516 (M.D. Pa. 1988).

89. *Jeffery*, 702 F. Supp. at 518.

90. *Id.* at 521. It is important to note that the due process challenge in *Jeffery* was based on a vagueness argument; the courts focus on the numerous approaches taken by local school boards implies that had the approval been centrally located, the vagueness argument would have failed. *Id.* For an example of an unsuccessful vagueness challenge to a compulsory education law, see *Burrow v. State*, 669 S.W.2d 441 (Ark. 1984).

91. ALA. CODE § 16-28-5 (1995).

92. 504 N.E.2d 592 (Mass. 1987). Even though the court upheld school board approval, the superintendents were cautioned "that the approval of a home school proposal must not be conditioned on requirements that are not essential to the State interest in ensuring that 'all the children shall be educated'." *Charles*, 504 N.E.2d at 600.

93. *Id.*

94. *See* ALA. ADMIN. CODE r. 290-3-2-.01 to .07 (1999).

95. One interesting challenge to the alleged impartiality of public school board officials was

would involve an inquiry into the approval of home school curricula by local school superintendents. As *Jeffery* and *Charles* demonstrate, to succeed claimants would have to demonstrate partiality or bias—proof of which may be difficult to obtain against local education officials acting solely in their official capacity.[96]

B. Teacher Certification

Another potential challenge to Alabama's method of regulating home schooling would be the claim that requiring teacher certification for private tutors is not rationally related to a legitimate state interest.[97] As mentioned previously, the exact state interest involved can be a subject of debate.[98] If a position is taken that the state interest is merely the education of all children, then a challenge to teacher certification gains strength.[99] But if the state interest is to educate children in a certain manner and by certain people, then certification is easier to justify. However the issue is framed, challenging a requirement that home school teachers be certified by the state would revolve around how the parties to the challenge define the state interest. Such a challenge would require the state to demonstrate that, at a minimum,[100] the requirement for teacher certification is rationally related to a legitimate state interest.

There can be little doubt that the state has a legitimate interest in the education of its children.[101] But if a challenge to a home school

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seen in *State v. Brewer*, 444 N.W.2d 923 (N.D. 1989). A home school family alleged an overall bias towards public schools by school board officials, but the court noted "there [was] no factual evidence in [the] record which reflect[ed] an actual bias on the part of [the] particular public school officials." *Brewer*, 444 N.W.2d at 925.

96. Finding partiality may be easier for a court if the decision-maker acts in multiple roles rather than merely acting as an educational administrator. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972). The real challenge for claims of bias or partiality would be to show that another function within the purview of an educational administrator, such as financial oversight, would cause him or her to favor one decision over another.

97. Since a certification of a private tutor is issued by the State Superintendent of Education under title 16, section 16-28-5 of the Alabama Code, this issue is closely related to the procedural due process claims discussed in the preceding section.

98. This debate will be referred to hereinafter as the "outcome/method debate."

99. Proponents of private school education could argue the same position since teachers at those schools are also required to be certified if the school aspires to receive overall certification by the state. Some private schools do not seek state certification, rather they obtain accreditation from regional private school, thereby avoiding the requirements of section 16-28-1(1) of the Alabama Code. Section 16-28-1 does not require *all* private schools to receive accreditation from the state.

100. This proof is a "minimum" because the level of judicial scrutiny in a home schooling case is uncertain. If a court should only use the minimum "rationally related" test, the state would not have a significant burden, but should a court use either a middle tier "undue burden" or a strict scrutiny test, the state's burden would be increased. *See supra* text accompanying notes 39-44.

101. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

teacher certification statute were brought by parents asserting the right to control the upbringing and education of their children, the type and scope of the state's interest would have to be defined.[102] The state would have to show that certifying home school private tutors is rationally related to its interest in educating children. In ruling on such issues, courts tend to look at the specifics of the state law and make a fact determinative ruling on relatedness.[103] The relationship between teacher certification and the quality of student education is not well established. One researcher noted that he has "found no significant correlation between the requirements for teacher certification and the quality of student achievement. (emphasis omitted)"[104] Private tutor certification presents another problem for a potential assertion by the state that such certification is rationally related to its interest in education: church schools. Teachers in church schools are not required to obtain certification from the State Superintendent of Education.[105] Unless one takes the cynical view that church school students are not included in the state's interest in education, it is hard to justify this disparate treatment.

Another factor that decreases the legitimacy of certification as rationally related to the state's interest in education is the trend in other states away from certification requirements for home school teachers.[106] Furthermore, if one decides the outcome/method debate in favor of outcome, it could be argued that home schooled children demonstrate that the quality of their education is at least equal to, and usually superior to, that of the students attending public schools.[107] The performance of some home schooled children clearly places a strain on any potential arguments by a state that certification, which requires a college diploma, is rationally related to the state's interest in education. One alternative taken by several states has been to eliminate the certification requirement and replace it with periodic testing of home

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102. As discussed previously, asserting a fundamental right may cause the level of scrutiny to increase to "strict." But short of asserting a fundamental right, a rational basis review would be the most likely approach; the remainder of this section is based on an assumption that rational basis review would be used for challenges to teacher certification.

103. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

104. KLICKA, *supra* note 3, at 133 (quoting Dr. Sam Peavey of the University of Louisville School of Education).

105. *See* ALA. CODE § 16-28-1(2) (1995).

106. KLICKA, *supra* note 3, at 137-38.

107. *Id.* at 8-14. One study performed by the Tennessee Department of Education found that home schooled children consistently scored well above their public school counterparts on the Stanford Achievement Test. *Id.* at 12. Tennessee home school teachers are only required to have either a high school diploma or a GED for home schools affiliated with a church-school. *Id.* at 138. Regardless of affiliation, these statistics tend to refute the claim that certification equals quality in education.

schooled students in order to monitor student progress.[108] This approach favors outcome in the outcome/method debate by assuring a quality education for children while also respecting a parent's right to oversee the education and upbringing of his or her child. If one takes the method side of the outcome/method debate, it would be easy to see the importance of certifying teachers to standardize the method of education.[109] But such an approach falls flat when confronted with the lack of certification requirements for church school teachers in Alabama.

Courts in other states have heard challenges to certification requirements placed on home school teachers by the state. In *People v. DeJonge,*[110] the Michigan Supreme Court heard a challenge to a certification requirement based on the parents' religious beliefs.[111] The court found that the certification requirement was unconstitutional since it failed to be the least restrictive means available to ensure that students receive a quality education.[112] This case demonstrates the likelihood of a successful challenge to Alabama's certification requirement if the parents are motivated by religious beliefs, regardless of whether or not they are affiliated with a church school. Moreover, if a court focuses on the outcome of the educational process, it may find it easier to rule for the parents rather than the state.[113]

Likewise, in *Care and Protection of Charles,*[114] the Massachusetts Supreme Judicial Court approved of a home school statutory scheme that allowed for home school teachers that had neither a college nor an

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108. *See id.* at 159; *see, e.g.*, TENN. CODE ANN. § 49-6-3050(b)(5)(A) (1996 & Supp. 1999).

109. Even under the outcome approach to education, certification of public school teachers is easy to justify due to the vast number of students in the public school system and a desire for standardization to ensure quality system-wide. Another factor that supports certification of public school teachers is the range of ethnic and family backgrounds that public school students bring into the classroom; training (and thus certification) on how to handle various situations can be crucial to the solid education of those students. But home school teachers teach their own children; the skill analogous to those for public school teachers accustomed to dealing with diversity is not needed due to the fact that it is *their* child that the home school parents are teaching.

110. 501 N.W.2d 127 (Mich. 1993).

111. *DeJonge*, 501 N.W.2d at 130. Since this challenge was based on a fundamental right, it incurred the highest level of scrutiny and required the state to demonstrate that certification was the least restrictive means. *Id.* at 131, 135.

112. *Id.* at 137. The court focused more on the outcome of the education and less on the method used by noting even "the prosecution never questioned the adequacy of the DeJonges' instruction or the education the children received." *Id.* at 130.

113. *But cf.* Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982). The *Jernigan* court clearly focused on the method of education espoused by the state instead of the actual quality, as evidenced by the observation that the parents could not show "any indication of Mrs. Jernigan's competence or ability to teach her own children other than the bare fact that she has a high school diploma." *Jernigan*, 412 So. 2d at 1245.

114. 504 N.E.2d 592 (Mass. 1987).

advanced degree.[115] The *Charles* court allowed local school superintendents to inquire into the qualifications of home school teacher's to ensure that the proper credentials and qualifications were present to teach at home.[116] In contrast to the courts in *Charles* and *DeJonge*, the court in *Fellowship Baptist Church v. Benton*,[117] while reviewing Iowa's education statutes in light of a challenge to mandatory teacher certification in church schools, held that teacher certification was rationally related to a legitimate state interest in education.[118] Consequently, courts have used various approaches to analyzing challenges to statutes mandating teacher certification for home school teachers.

A brief survey of the rulings from various courts demonstrates that the issue of teacher certification is by no means settled. It should be remembered, however, that even under rational basis scrutiny, courts still analyze the purpose and effect of the statute to find the requisite relatedness. Alabama law has numerous inconsistencies in that it applies certification requirements to non-church affiliated home school teachers, but not to home school teachers who are affiliated with a church. This disparity, coupled with research that shows no direct correlation between certification and student achievement, could present a strong challenge to the requirement that private tutors (i.e., home school teachers not affiliated with a church) be certified by Alabama's Superintendent of Education.

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115. *Charles*, 504 N.E.2d at 601. The *Charles* court began its review of the laws by acknowledging a parental right under the Fourteenth Amendment to oversee the upbringing and education of their children. *Id.* at 598. Interestingly, the court used terms like "substantial interest" (as opposed to "compelling" which is usually used for strict scrutiny) when discussing the state's interest in education, which implied application of some form of intermediate scrutiny to the law that conflicted with the parents' fundamental rights. *Id.* at 599. This natural tendency to "split the difference" between levels of scrutiny when a fundamental parental right is at issue (be it based on religion or due process) is a strong argument for using the "undue burden" level of scrutiny in reviewing cases dealing with home schools. *See supra* text accompanying note 44; *see also* Lerner, *supra* note 44, at 389.

116. *Charles*, 504 N.E.2d at 599. While this may bring up issues of the neutrality of the superintendent in approving of the home school teacher due to financial considerations, that issue was not addressed by the court.

117. 620 F. Supp. 308 (S.D. Iowa 1985). While the challenge in this case dealt with church school certification and not home schooling, the decision does illustrate how some courts may view the relatedness of certification to the state's interest in education. For cases approving of certification of home school teachers, see *Sheridan Rd. Baptist Church v. Department of Educ.*, 348 N.W.2d 263 (Mich. Ct. App. 1984) and *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981).

118. *Fellowship Baptist*, 620 F. Supp. at 316 (observing that "[t]he importance lies, not in the piece of paper itself, but in the education a person must receive to become eligible for the certificate.").

C. Due Process

A final vulnerability in Alabama's statutory regulation of home schools rests in potential substantive due process challenges based on an infringement of a fundamental right. The Fourteenth Amendment of the U.S. Constitution forbids a state action that would deprive an individual of life, liberty, or property without due process of the law.[119] Succinctly stated, "courts use the concept of substantive due process to review the ability of government to restrict the freedom of action (regarding life, liberty, or property) of all persons."[120] Since a challenge to home school statutes under the U.S. Constitution would not address Alabama's statutes any differently than the statutes of other states, this section of the Comment will not address many Alabama-specific issues with regard to due process. As noted in Part II, the question of fundamental rights in the context of education can bring a range of answers, from non-fundamental to fundamental, and thus lead to very different levels of scrutiny.[121] Nonetheless, a challenge based on a substantive due process claim would demonstrate the tension between the Court's view that education is not a fundamental right[122] and its holdings that a parent has a fundamental right to raise and educate his or her child.[123] Since the requisite state action necessary for a due process claim is clearly present in the regulation of home schools,[124] the outcome would rest on the determination of whether or not a fundamental right is at issue.[125] Several decisions from various state courts may provide some insight into how courts handle substantive due process claims from home schooling parents.

One of the most enlightening cases involving assertions of fundamental parental rights under the Fourteenth Amendment is *People v. Bennett*.[126] This case resulted from a challenge by home school parents

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119. U.S. CONST. amend XIV.

120. NOWAK & ROTUNDA, *supra* note 38, § 11.4, at 369.

121. *See supra* text accompanying notes 37-44.

122. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

123. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

124. *See* ALA. CODE § 16-28-1 (1995). In regards to the requirement that the act at issue in a due process claim must have been undertaken by a governmental entity, "[m]ost of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of governmental entities. . . . It should be noted that actions of any governmental entity give rise to state action for the purposes of constitutional limitations." *See* NOWAK & ROTUNDA, *supra* note 38, § 12.1, at 452.

125. Some due process challenges in home schooling cases have involved a claim that a state law regulating home schools is vague, and such vagueness violates the claimant's due process rights. *See, e.g.*, Roemhild v. Georgia, 308 S.E.2d 154 (Ga. 1983). While vagueness has proven to be a valid claim against other statutory schemes, this possible challenge will not be discussed in this Comment.

126. 501 N.W.2d 106 (Mich. 1993).

to a criminal conviction for failing to comply with Michigan's compulsory attendance laws.[127] The parents made no claim based on religious rights, but rather relied solely on a claim of a fundamental right to raise and oversee the education of their children.[128] The parents in *Bennett* argued that a requirement to obtain certification from the state for home school teachers violated their fundamental right to educate their children as established by the Supreme Court in *Pierce v. Society of Sisters*.[129] The court pointed to two possible readings of *Pierce* by noting that "in a broad sense, *Pierce* stands for the proposition that parents have a right to choose either public or private education for their children. In a narrow sense, *Pierce* has been interpreted as providing parents the right to direct the religious education of their children."[130] In this distinction, the *Bennett* court only provided authority supporting the "broad" reading of *Pierce*.[131] The court went on to find that no fundamental right exists for parents to home school their children and upheld the convictions of the parents by using the lowest tier, "rationally related" test for due process analysis.[132] Therefore, a challenge to a home school statute based on substantive due process would be most successful if the focus remains on the holding of *Pierce* and argues for the broad reading of that case. Additionally, *Bennett* also illustrates that an argument for absolutely no state interference with home schooling will likely be met with some skepticism from courts, so concessions by parents to various forms of state oversight will allow a court to better balance the competing interests at issue in such a challenge.[133]

One case that demonstrates a compromise between the competing interests is *Care and Protection of Charles*.[134] As noted earlier,[135] the *Charles* court utilized a form of scrutiny similar to the "undue burden"

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127. *Bennett*, 501 N.W.2d at 108.

128. *Id.* This fact makes the case especially enlightening since a home school parent trying to qualify as a "private tutor" in Alabama would, in all likelihood, not attempt to assert First Amendment religion rights in a challenge to the state law.

129. *Id.* at 112. The parents relied heavily on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and such reliance, according to the court, was ill-placed. *Id.* This demonstrates that home school parents who assert no religious freedom claims should focus their arguments on the fundamental rights discussed in *Pierce* and not try to include holdings that combine various fundamental rights. Of interest, however, is that immediately after pointing out the inapplicability of *Yoder*, the *Bennett* court then used that case in its arguments against finding a fundamental right to home school. *Id.* at 113. The parents also provided numerous other cases in support of their claim of a fundamental right to home school their children. *Bennett*, 501 N.W.2d at 113-14.

130. *Id.* at 112.

131. *Id.* at 113.

132. *Id.* at 115-16.

133. Recommended forms of oversight will be discussed *infra* Part V.

134. 504 N.E.2d 592 (Mass. 1987).

135. *See supra* note 115 and accompanying text.

approach used most notably in abortion regulation cases. In doing so, the court provided guidance to local school boards on how to review home school applications while respecting parental rights.[136]

Finally, some courts have recognized a fundamental right to oversee the education of their children. In *Appeal of Peirce,*[137] the Supreme Court of New Hampshire took a broad view of the holding in *Pierce v. Society of Sisters* and acknowledged a fundamental right for parents to home school their children. While the challenge in this case combined elements of procedural and substantive due process and the majority limited its discussion primarily to statutory interpretation,[138] one concurring justice focused on a broad reading of *Pierce* and acknowledged a fundamental right of parents to oversee the education of their children.[139] The concurring members of the court noted that "while the State may adopt a policy requiring that children be educated, it does not have the unlimited power to require they be educated in a certain way at a certain place."[140] The concurring opinion also pointed out that "at common law the parents' authority over the education of their children was unquestionably a natural right which arose out of those parental responsibilities."[141]

In light of the various approaches used by state courts in applying the holding of *Pierce*, a substantive due process claim based on a parent's fundamental right to oversee the education of his or her child would turn largely on a court's reading of that case. A narrow reading would likely lead to use of the lowest tier, "rationally related" test and allow for state regulation. If, however, a court finds a fundamental right in *Pierce*, as many scholars do,[142] then the strict scrutiny test would be utilized in reviewing the statute or state action, which would likely result in a finding that such action or statute is unconstitutional. At a minimum, if a parent's right to oversee the education of his or her child is found to be fundamental, then a middle tier, "undue burden" scrutiny would be applied, as the *Charles* court did, to handle the competing interests.

It could be argued that the state action in Alabama that infringes

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136. *Charles*, 504 N.E.2d at 600-02. For additional discussion of this case, see Lerner, *supra* note 44, at 389-91.

137. 451 A.2d 363 (N.H. 1982).

138. *Peirce*, 451 A.2d at 364-66.

139. *Id.* at 367.

140. *Id.*; *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

141. *Peirce*, 451 A.2d at 367 (Douglas & Brock, J.J., concurring) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 450-53 (1809)).

142. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 38, § 11.7, at 393-94 (noting that decisions such as *Pierce* have been viewed as only applying in religious aspects of child-rearing, but such a limited ruling was not observed in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977)).

upon a parent's right to oversee his or her child's education is the requirement that home school teachers not only obtain certification from the state superintendent, but also seek curriculum approval from a local school superintendent.[143] While regulation of education is well established as a legitimate state interest,[144] if the aforementioned requirements, when applied to a fundamental right, are not viewed as "compelling," the law will not survive strict scrutiny review.[145] As previously noted, this determination would depend in large part on whether or not a court takes a broad or narrow view of *Pierce v. Society of Sisters*.[146] Furthermore, even if Alabama's statutes are viewed as compelling (as opposed to merely legitimate), it may be difficult for the state to mount a solid argument to prove that the relational requirement is satisfied (i.e., the means of certifying and approving home schools is necessary to achieve the ends of having an educated populace).[147] If a court were to find no fundamental parental right at issue in a substantive due process claim, a showing that the home schooling statutes were rationally related to the legitimate state interest of educating the populace would result in a court upholding the constitutionality of the statutes with little problem.

V. RECOMMENDATIONS

Even though Alabama's statutory regulation of home schools has not faced a serious legal challenge and appears to be, at least in some ways, solid in light of other states' decisions, there are several changes that could be made to balance the interests of the state and the rights of parents. In the interest of making a somewhat solid (at least legally) system better,[148] the following are recommendations that attempt to incorporate methods of home schooling regulations and statutes from another state, Tennessee, to better balance the various interests involved.[149]

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143. *See* ALA. CODE § 16-28-5 (1995).

144. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

145. *See, e.g.*, People v. DeJonge, 501 N.W.2d 127 (Mich. 1993).

146. *See supra* text accompanying notes 130-32.

147. This is due, in large part, to the lack of requirements for approval by the Alabama State Superintendent of Education of curricula for church and private schools not certified by the state. An argument by the state that attempts to establish a clear relation between certification/approval and quality education may not justify the lack of certification/approval for church and non-certified private schools.

148. The Supreme Court encouraged parties urging the invalidation of a system at least offer some guidance on the type of system that should be used in its place. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

149. As has been the case throughout this Comment, the recommendations of this portion will be for regulation of home schools that are not affiliated with a church, and thereby fall under the provisions for a "church school." *See* ALA. CODE § 16-28-1(2) (1995). This is due to

Tennessee's statutory regulation of home schools provides an interesting contrast to Alabama's in several ways. Returning to the "outcome/method" debate discussed previously, Tennessee has maintained a focus on outcome by requiring that home school students take a standardized test periodically to ensure the adequacy of education received.[150] This approach balances the state's legitimate interest in the education of its citizenry, while allowing parents to oversee the education of their children. Should Alabama adopt a testing requirement for home school students, it could establish a minimum test score for those students based on the scores of public school students, as Tennessee has done, that would trigger more state involvement if the home school student failed to perform at the same level as their public school counterparts.[151] Since Tennessee's statutory requirements for testing are very detailed, they provide clear guidelines for parents and local superintendents to use to ensure that home school students are receiving an adequate education.[152] The establishment of periodic testing would greatly diminish the potential for claims based on procedural or substantive due process, while assuring a certain level of performance that will satisfy the state's interest in an educated citizenry.

Another lessening of state regulation could be the abandonment of the requirement that home school teachers, or "private tutors" in Alabama, be certified by the state. Various states have different levels of qualifications and terminology for home schooling teachers,[153] but an abandonment of certification in Alabama would certainly expand the number of parents who would be able to home school their children. Again, Tennessee's statute provides a system that is remarkably differ-

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the existence of practically no regulation of church schools in Alabama and the obvious introduction of First Amendment religious rights issues that, as noted earlier, are beyond the scope of this Comment.

150. *See* TENN. CODE ANN. § 49-6-3050(b)(5)(A) (1996 & Supp. 1999) (requiring tests to be administered to students in grades five, seven, and nine). While this testing is a good balance, testing on a more frequent basis would probably help to ease concerns by state education authorities regarding the progress of the home school student's education. Additionally, Tennessee requires that the test scores be reported to the parents, superintendent, and state board of education. *Id.* § 49-6-3050(b)(5)(B)(iii).

151. Tennessee uses a "stair-step" approach for actions triggered by low test scores. Should the home school student fall three to six months behind the appropriate grade level performance, the home school parent-teacher must have a meeting with the local superintendent. *See id.* § 49-6-3050(b)(6)(A). Should the student fall six to nine months behind the appropriate grade level in various core courses, the parent must consult with a state certified teacher whose primary area of expertise is the subject in which the student was found to be below standards, and the student must receive remedial instruction in that course. *See id.* § 49-6-3050(b)(6)(B). Finally, should the student fall more than one year behind the appropriate grade level for two consecutive tests, the local school superintendent can require the parents to enroll the child in a public, private, or church-related school. *See id.* § 49-6-3050(b)(6)(C)(i).

152. TENN. CODE ANN. § 49-6-3050(b)(6).

153. *See* KLICKA, *supra* note 3, at 138-42.

ent from Alabama's.[154] The approach taken in Tennessee assures that the home school teacher is qualified to teach the children according to that child's grade level; it does not apply the blanket approach seen in Alabama where the assumption appears to be that certification equals qualification regardless of the grade level of the student being taught. Additionally, the state can still verify the quality of the education being received by the home schooled student with the aforementioned periodic standardized tests. This approach, like the testing requirement, not only lessens the strength of a substantive due process claim, but also removes the approval requirement from a state agency, essentially eliminating the potential procedural due process claim based on the lack of a neutral, detached decision-maker.

Finally, the state could change the reporting requirements placed on private tutors from approval (via certification) by the state to mere registration with the local school board.[155] This would allow the parent to notify the school board of an intention to home school and allow them to report the curriculum that will be utilized.[156] The local school board would not have approval authority, but rather can work with the parents by reviewing the proposed curriculum and addressing potential shortcomings, which the parent could then use to improve the curriculum. Here the state education authorities are not involved at all and the local school board occupies a passive role, absent a failure by the home school student to perform adequately on the standardized tests. Should the student fail the standardized test, the local school board could then change roles and become a reporting agency to the state education authorities. Then the state would have a legitimate interest in requiring certification of the home school teacher and in playing a more intrusive role in that child's education. Essentially, the state acts as a safety net in the event that the home school teacher fails to perform his or her job adequately.

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154. Again, Tennessee uses a "stair-step" approach in its educational requirements for home school parents. Home school teachers who teach students in grades kindergarten through eight are required to have either a high school diploma or a GED. TENN. CODE ANN. § 49-6-3050(b)(4). Home school teachers who teach students in grades nine through twelve must have at least a baccalaureate degree from an accredited college or university. *See id.* § 49-6-3050(b)(7).

155. Registration is currently required of private tutors, but only after the tutor has been certified, or approved, by the state. *See* ALA. CODE § 16-28-5 (1995).

156. Tennessee only requires that the home school parent notify the local school board prior to the commencement of each school year; such notification includes the names, number, age, and grade level of the children involved. *See* TENN. CODE ANN. § 49-6-3050(b)(1).

VI. CONCLUSION

Alabama's regulation of home schools not affiliated with a church is one of the strictest systems in the United States. If the real issue underlying education statutes and regulation is the education of the child and not the manner in which that education is given, then the recommendations above would ensure that the child does receive an education without undue intrusion by the state. Even though home schooling has not been litigated often in Alabama, issues such as school funding and the quality of the public school system may drive more parents in all socio-economic areas to educate their children at home. Should this happen in large numbers, the public schools would lose an enormous amount of their funding and mounting financial pressure may encourage more denials by the state of private tutor certifications. This would result in more challenges to the state's authority to regulate those schools. The proposed recommendations, made in light of the various interests involved and the approach to home school regulation by other states, may act to balance all these interests adequately, thereby attempting to guarantee what all the interested parties hope for—that no child enters adulthood without a quality education.

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