

FOR GOD OR GRADES? STATES IMPOSING FEWER REQUIREMENTS ON RELIGIOUS HOME SCHOOLERS AND THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The 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.¹

I. INTRODUCTION

Picture a neighborhood including three families: the Joneses, the Smiths, and the Does.² Mr. and Mrs. Jones and Mr. and Mrs. Smith have all completed high school, but have no additional education. Mr. and Mrs. Doe each have bachelor's degrees. The Jones family is religious and their church encourages home education of children. The other two families are not religious. All three families want to home school their children.³ In many states, the requirements each family must meet to home school their children are the same.⁴ A unique situation arises if their neighborhood is located in Alabama, Virginia, or Wyoming. In these three states, the Joneses would be subject to fewer state home schooling requirements because they are religious.⁵

If located in Alabama, the Joneses could home school as a church school by filing a one-time attendance form, keeping an attendance record, and obtaining sponsorship from their church.⁶ In contrast, the Smith and Doe families face fewer choices and greater obstacles in Alabama.⁷ The only home education option for the Smiths and the Does

¹ *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

² Families in this hypothetical are purely fictional. Any resemblance to actual families living or dead is coincidental.

³ This hypothetical assumes that the parents of all three families do not wish to incorporate with other home schoolers to form a private school or hire a private tutor to educate their children at home.

⁴ See *infra* Part II.A.1.

⁵ See *infra* Part II.A.2.

⁶ ALA. CODE § 16-28-1(2) (2001).

⁷ *Id.* § 16-28-5.

in Alabama is under the private tutor statute.⁸ Under the private tutor statute, the families would be required to provide instruction 140 days a year including three hours a day between 8:00 a.m. and 4:00 p.m., include specific subjects in their curriculum, file annual notice, and keep records of attendance and academic progress.⁹ In addition, the private tutor statute requires teacher certification.¹⁰

If located in Virginia, the Joneses would be able to home school under the religious exemption statute.¹¹ The Jones family would merely have to provide one-time notice to the local school board or superintendent claiming the religious exemption, and may wish to include statements from their pastor and friends to vouch for the sincerity of their beliefs.¹² The Smiths and the Does could not use the religious exemption statute and would have to comply with one of the options under the home school statute.¹³ The Smith family could not use option one because neither parent has a baccalaureate degree.¹⁴ They could home school under option three, approved correspondence course, or option four, submission of evidence of parent's ability to teach.¹⁵ The Does could also home school under option three or four, but would likely choose option one, requiring a baccalaureate degree.¹⁶ Under any of the options available to them, the Smith and Doe families would have to submit a curriculum description including subjects taught and textbooks used, file annual notice, submit standardized test scores to the local superintendent every other year, and hold classes a minimum of

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; see *infra* notes 113-21 and accompanying text (discussing teacher certification requirements).

¹¹ VA. CODE ANN. § 22.1-254(B)(1) (Michie 2002); see *infra* notes 133-37 and accompanying text (discussing the Virginia statute).

¹² VA. CODE ANN. § 22.1-254(B)(1). Statements from pastor and friends are not required but parents may want to submit them anyway to avoid future challenges to the validity of their religious beliefs. Home School Legal Defense Association, *Home Schooling in the United States, A Legal Analysis*, at <http://www.hslda.org/laws/analysis/va.pdf> (last updated Nov. 2003).

¹³ VA. CODE ANN. § 22.1-254.1.

¹⁴ *Id.*

¹⁵ *Id.* It is unlikely that any of the families would home school under the teacher certification given the highly prohibitive nature of the teacher certification requirement. See *infra* notes 113-21 and accompanying text (discussing teacher certification requirements).

¹⁶ VA. CODE ANN. § 22.1-254.1.

one hundred eighty days a year.¹⁷ However, the Jones family would not be subject to those requirements under the religious exemption.¹⁸

If located in Wyoming, all three could home school under the state's home school statute.¹⁹ The home school statute requires annual notice that the required subjects are being taught.²⁰ However, this requirement may be reduced or eliminated for the Jones family. Under the home school statute, the Jones family can exclude from the required subjects any topic or concept not in conformity with their religious beliefs.²¹ The Jones family also has the option of home schooling without any state regulation as a church school, if their church or denomination sponsors them.²²

The home schooling requirements in Alabama, Virginia, and Wyoming create a situation where the state's regulation of home schooling is not neutral toward religion.²³ This situation may violate the Establishment Clause of the First Amendment.²⁴ This Note will look at possible Establishment Clause problems with the Alabama, Virginia, and Wyoming home school regulations, examine whether the regulations could be saved by a Free Exercise defense if an Establishment Clause violation is found, and propose a model home school statute that is neutral towards religion and promotes the state's interest in educating its citizens. In Part II, this Note describes the legal history of home schooling statutes and the religion clauses of the First Amendment.²⁵ Part III analyzes whether the Virginia, Alabama, and Wyoming home school regulations violate the Establishment Clause.²⁶ In addition, Part III analyzes whether the Alabama, Virginia, and Wyoming statutes are constitutional to avoid a conflict with the Free Exercise Clause, despite

¹⁷ *Id.*

¹⁸ *Id.* § 22.1-254(B)(1).

¹⁹ WYO. STAT. ANN. § 21-4-102(b) (Michie 2001); *see infra* notes 138-44 and accompanying text (discussing the Wyoming statutes).

²⁰ WYO. STAT. ANN. §§ 21-4-102(b), -101(a)(vi).

²¹ *Id.* § 21-4-101(a)(vi). Other states have similar curriculum exemptions. *See* MO. ANN. STAT. § 167.031.3 (West 2000); WIS. STAT. ANN. § 118.165 (West 1999 & Supp. 2002). This Note will only address the Wyoming curriculum exemption; however, a similar analysis would apply to the other curriculum exemptions. *See infra* text accompanying notes 298-301.

²² WYO. STAT. ANN. § 21-4-101(a)(iv).

²³ *See infra* Part II.A.2.

²⁴ *See infra* Part III.A.

²⁵ *See infra* Part II.

²⁶ *See infra* Part III.A.

the lack of neutrality towards religion.²⁷ Part IV of this Note proposes a model home school statute that avoids the potential First Amendment problems raised by the Alabama, Virginia, and Wyoming statutes.²⁸ The model statute evades conflict with the religion clauses of the First Amendment by avoiding any preference towards religion, which might create a problem under the Establishment Clause, and by imposing requirements that further the state's interest in education without infringing the Free Exercise rights of religious home schoolers.²⁹

II. BACKGROUND

Like the families discussed in Part I, a growing number of parents in the United States are choosing to home school their children.³⁰ Home schooling is permitted in every state, but the regulations states impose on home schoolers may raise interesting legal issues.³¹ In order to fully understand the legal issues raised by home schooling, this Note discusses the legal history of home schooling in the United States.³² This Note discusses the types of requirements states impose on home schoolers, focusing on the states providing exemptions from home schooling requirements for religious home schoolers.³³ To evaluate the constitutionality of these exemptions, this Note discusses the legal history of the Establishment Clause, including how the Establishment Clause has been interpreted as promoting neutrality towards religion.³⁴ In addition, this Note discusses the situations where religious exemptions, despite their lack of neutrality, are permissible to avoid infringement of Free Exercise rights.³⁵

A. Home Schooling

Historically, education in the United States was private.³⁶ The duty to educate children was placed on parents under early colonial laws.³⁷ It

²⁷ See *infra* Part III.B.

²⁸ See *infra* Part IV.

²⁹ See *infra* Parts IV-V.

³⁰ See *supra* Part I; *infra* notes 44-46 and accompanying text (discussing the number of home schoolers in the United States).

³¹ See *infra* Parts II-III.

³² See *infra* Part II.A.

³³ See *infra* Part II.A.

³⁴ See *infra* Part II.B.1; see also *infra* note 157.

³⁵ See *infra* Part II.B.2.

³⁶ Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 238 n.7 (1963). In *Abington* the Court stated:

is clear that home education played a prominent role in early American education.³⁸ Several important historical figures, including a number of American presidents, received at least a portion of their education at home.³⁹ However, with the growth of the compulsory public education movement, home education began to decline in the nineteenth century.⁴⁰

The origins of the modern movement for free state-supported education cannot be fixed with precision . . . [i]n the North American Colonies, education was almost without exception under private sponsorship and supervision, frequently under control of the dominant Protestant sects. This condition prevailed after the Revolution and into the first quarter of the nineteenth century.

Id.; see also MARVIN E. FRANKEL, *FAITH AND FREEDOM: RELIGIOUS LIBERTY IN AMERICA* 97 (1994).

³⁷ CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL* 31 (2d ed. 1998); JOHN W. WHITEHEAD & ALEXIS IRENE CROW, *HOME EDUCATION: RIGHTS AND REASONS* 116 (1993). "Early in the history of the United States, the courts had no doubt that education was a function of the parents and no more a function of the state than is the begetting of children. Education was seen as an aspect of child-rearing." ROUSAS JOHN RUSHDOONY, *THE MESSIANIC CHARACTER OF AMERICAN EDUCATION* 322 (Ross House Books 1995).

³⁸ WILLIAM M. GORDON ET AL., *THE LAW OF HOME SCHOOLING* 5 (1994) (suggesting that home education may be a reason for the slow development of public education); WHITEHEAD & CROW, *supra* note 37, at 115. Education was important to many New England colonial parents "because many of the colonists themselves were highly educated and because the colonists wanted their children to be able to understand the basic principles of Christianity and government." *Id.* at 116; see also MARY LEPPERT & MICHAEL LEPPERT, *HOMESCHOOLING ALMANAC 2002-2003*, at 5 (2001) (noting that home schooling was the traditional method of educating children in the 1700s and 1800s).

³⁹ PATRICK BASHAM, *CATO INST., HOME SCHOOLING: FROM THE EXTREME TO THE MAINSTREAM* 5 (2001), available at <http://www.fraserinstitute.ca/admin/books/files/homeschool.pdf> (listing as examples: George Washington, John Quincy Adams, Woodrow Wilson, Franklin Delano Roosevelt, Thomas Edison, General Robert E. Lee, Booker T. Washington, Mark Twain, and Andrew Carnegie); GORDON ET AL., *supra* note 38, at 5-6 (listing as examples: George Washington, John Madison, John Adams, John Quincy Adams, Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt); GRACE LLEWELLYN, *THE TEENAGE LIBERATION HANDBOOK* 371 (2d ed. 1998) (noting that "one third of the men who signed the Declaration of Independence, the Articles of Confederation, and the Constitution of the United States had no more than a few months of schooling up their sleeves"); TAMRA B. ORR, *A PARENT'S GUIDE TO HOMESCHOOLING* 17 (2002) (listing as examples: Ansel Adams, Irving Berlin, Pearl Buck, Samuel Clemens, Thomas Edison, Frank Lloyd Wright, Beatrix Potter, Jack London, Alexander Graham Bell, Orville and Wilbur Wright, Douglas MacArthur, Leonardo da Vinci, Andrew Wyeth, Mozart, Hans Christian Anderson, Charles Dickens, Agatha Christie, C.S. Lewis, Charlie Chaplin, Will Rogers, and Clara Barton); WHITEHEAD & CROW, *supra* note 37, at 116 (listing as examples: George Washington, Thomas Jefferson, Woodrow Wilson, Franklin Roosevelt, Abraham Lincoln, John Quincy Adams, John Witherspoon, Benjamin Franklin, Patrick Henry, Florence Nightingale, Booker T. Washington, Thomas Edison, and Robert E. Lee).

⁴⁰ WHITEHEAD & CROW, *supra* note 37, at 116.

The modern home schooling movement began in the 1960s from two very different groups.⁴¹ One group came from the "New Left" and turned to home schooling due to dissatisfaction with the restrictions of public education.⁴² The other group began home schooling for religious reasons.⁴³ The number of home schoolers in the United States is difficult to determine, but all estimates indicate a steady growth in the movement.⁴⁴ It is estimated there may be as many as 1.7 million children currently being home schooled.⁴⁵ When considering the turnover rate, the percentage of children home schooled, at some point in their education, could be somewhere between six and twelve percent.⁴⁶

⁴¹ BASHAM, *supra* note 39, at 6. The majority of home schoolers were "members of the counter-cultural Left" in the 1960s and 1970s. *Id.* The majority of home schoolers now are more closely associated with the "Christian Right." *Id.*

⁴² *Id.* at 5 (discussing the pedagogical strain and John Holt); SAMUEL L. BLUMENFELD, HOMESCHOOLING: A PARENT'S GUIDE TO TEACHING CHILDREN 81-82 (1998) (discussing secular motivations for home education); GORDON ET AL., *supra* note 38, at 2 (discussing "pedagogues" and John Holt); WHITEHEAD & CROW, *supra* note 37, at 116; *see infra* notes 55-57 and accompanying text (discussing non-religious motivations for home schooling). Pedagogues chose to educate their children at home primarily due to dissatisfaction with the teaching methods of public and private schools. Jane A. Van Galen, *Ideologues and Pedagogues: Parents Who Teach Their Children at Home*, in HOME SCHOOLING: POLITICAL, HISTORICAL, AND PEDAGOGICAL PERSPECTIVES 71 (Jane Van Galen & Mary Anne Pitman eds., 1991). The Pedagogues try to provide different methodologies and environments for their children's education. *Id.* at 71-74.

⁴³ BASHAM, *supra* note 39, at 5 (discussing the ideological strain); BLUMENFELD, *supra* note 42, at 83-84; GORDON ET AL., *supra* note 38, at 2-3 (discussing "ideologues"); WHITEHEAD & CROW, *supra* note 37, at 115-16; *see infra* notes 51-54 and accompanying text. Ideologues educate their children at home primarily because "[t]hey object to what they believe is being taught in public and private schools and they seek to strengthen their relationships with their children." Van Galen, *supra* note 42, at 66-67. The objection to public and private school instruction is its inconsistency with the religious beliefs held by the families. *Id.* at 67. In addition, some Ideologue parents believe they are "following God's will and fulfilling their responsibilities as Christian parents" by educating their children at home. *Id.* These parents "believe that God requires them to teach their children at home" and that home education is "an exercise of their Christian faith." *Id.* at 68-69. Seeing God as the source of the authority and ability to educate their children at home, some Ideologues reject any form of government regulation or interference with home education. *Id.* at 69-71.

⁴⁴ PATRICIA M. LINES, U.S. DEPT. OF EDUC., HOMESCHOOLERS: ESTIMATING NUMBERS AND GROWTH 1 (Web ed. 1999) (estimating the number of home schoolers at 250,000-350,000 in 1990-1991 and as many as one million in 1997-1998); MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 10-14 (2001) (noting the difficulty in obtaining statistical data on home schoolers).

⁴⁵ BASHAM, *supra* note 39, at 6; *see also* STACY BIELICK ET AL., U.S. DEPT. OF EDUC., HOMESCHOOLING IN THE UNITED STATES: 1999, at 3 (2001), available at <http://nces.ed.gov/pubs2001/2001033.pdf> (estimating the number of home schoolers in 1999 at about 850,000).

⁴⁶ LINES, *supra* note 44, at 8.

The home schooling movement is surprisingly diverse.⁴⁷ There are many racial and ethnic minorities represented, and home school families can be found at various income levels.⁴⁸ There are also some Americans who choose to home school their children while living overseas.⁴⁹ Even some working and single parents have chosen home schooling.⁵⁰

Although many home schoolers are religious, religion is just one reason parents choose to home school.⁵¹ Those Christians who educate

⁴⁷ PATRICK FARENGA, *THE BEGINNER'S GUIDE TO HOMESCHOOLING* 8-9 (1999); see *infra* notes 48-57 and accompanying text.

⁴⁸ BIELICK ET AL., *supra* note 45, at 5-7 tbls. 2-3 (estimating the number of homeschoolers of various ethnicities and income levels); BLUMENFELD, *supra* note 42, at 153-60 (discussing the growing number of African-American home schoolers); KATHY ISHIZUKA, *THE UNOFFICIAL GUIDE TO HOMESCHOOLING* 46-47 (2000) (discussing options and curriculum for minority home schoolers); LEPPERT, *supra* note 38, at 209-10 (2001) (noting that some African-Americans choose to home school "as a means of retaining their culture"); ORR, *supra* note 39, at 14 (discussing the unique problems faced by racial minority home schoolers); see also LEPPERT, *supra* note 38, at 501 (listing resources for Native American home schoolers). In Georgia it is estimated that about ten percent of home schoolers in the state are African-American. S.A. Reid, *Black Families Explore Home Schooling*, ATLANTA J. CONST., Jan. 16, 2003, available at <http://www.accessatlanta.com/ajc/metro/0103/16homeschool.html> (on file with Valparaiso University Law Review). As a result, several home school support groups for African-Americans have formed in the Atlanta area. *Id.*

⁴⁹ ISHIZUKA, *supra* note 48, at 48-50 (discussing tips and resources for Americans home schooling overseas). It is not only Americans who want to educate their children at home. See, e.g., Meredith Artley, *Expat Advisor: Homeschooling in Ireland*, INT'L HERALD TRIB., Jan. 10, 2003, available at <http://www.iht.com/articles/82924.html> (discussing the requirements for home schooling in Ireland and other European countries); Home School Legal Defense Association, *Homeschooling in Romania* (Jan. 10, 2003), at <http://www.hslda.org/hs/international/Romania/200301100.asp> (discussing home schooling in Romania and the need for curriculum); Home School Legal Defense Association, *Hungarian Homeschoolers Need Our Help* (Jan. 22, 2003), at <http://www.hslda.org/hs/international/Hungary/200301220.asp> (discussing the legal situation of Hungarian home schoolers and the need for curriculum); David Leask, *Parents Vote for Home Schooling*, EVENING TIMES ONLINE, at <http://www.eveningtimes.co.uk/hi/news/5011520.html> (last visited Apr. 23, 2004) (discussing Scottish parents' views on home schooling). Home schooling movements are developing in the United Kingdom, Germany, Japan, and Switzerland. BASHAM, *supra* note 39, at 13.

⁵⁰ BIELICK ET AL., *supra* note 45, at 5-7 tbls. 2-3 (estimating the number of single parents and parents participating in the workforce); FARENGA, *supra* note 47, at 9-10 (discussing working parents who home school).

⁵¹ See VICKI CARUANA, *THE ABCS OF HOMESCHOOLING* 27-48 (2001) (describing religious motivations for home schooling); STEVENS, *supra* note 44, at 12 (noting that a study of home schoolers "tapped a highly religious population"); WHITEHEAD & CROW, *supra* note 37, at 131 (describing the prevalence of religious motivations for home schooling, but noting that it is seldom the only motivation). The majority of home schoolers claim Christianity as their religion, however, there are home schoolers from many other religious groups. BASHAM, *supra* note 39, at 6; see also LEPPERT, *supra* note 38, at 495 (listing resources for

their children at home for religious reasons generally believe that "parents have a duty to provide [their] child with a godly education."⁵² Some religious home schoolers also see public education as destructive to their beliefs.⁵³ Others believe that education that ignores religion is incomplete and fails to teach children essential moral values.⁵⁴

Catholic, Jewish, Latter-Day Saint, Muslim, and Seventh-Day Adventist home schoolers). The fastest growing religious group of home schoolers are Muslim Americans, who are "predicted to double every year for the next eight years." BASHAM, *supra* note 39, at 6.

⁵² ROUSAS JOHN RUSHDOONY, *THE INSTITUTES OF BIBLICAL LAW* 179, 182 (1977) [hereinafter RUSHDOONY, *INSTITUTES*]; see, e.g., *Deuteronomy* 6:6-7 (NIV) ("These commandments that I give you today are to be upon your hearts. Impress them on your children."); *Psalms* 78:1-8 (NIV); *Proverbs* 22:6 (NIV) (stating "Train a child in the way he should go, and when he is old he will not turn from it."). Some have even argued that Christian education is required by the Great Commission:

Thus, we are plainly *required* to have Christian schools to teach every covenant child the word of the Lord and to study every area of life and thought in terms of Christian presuppositions. It is also our duty to "teach all nations" (Matt. 28:19), and all the inhabitants thereof. The Great Commission is a commission to *teach* and to *baptize*: it has reference to education as well as to worship, to the establishment of schools as well as churches.

ROUSAS JOHN RUSHDOONY, *LAW AND SOCIETY* 117 (1986) [hereinafter RUSHDOONY, *LAW AND SOCIETY*]; see also RUSHDOONY, *INSTITUTES*, *supra*, at 184-85 (arguing that the "family" is the best school for children). See generally CARUANA, *supra* note 51, at 25-35 (discussing religious motivations for home schooling).

⁵³ RUSHDOONY, *INSTITUTES*, *supra* note 52, at 296.

State control of education has been a central means of destroying Christian order. It excludes from the curriculum everything which points to the truth of Biblical faith and establishes a new doctrine of truth. In the name of objective reason, it insists that its highly selective hostility to Biblical faith be regarded as a law of being.

Id. Some see public education as an anti-Christian religion. RUSHDOONY, *supra* note 37, at 316 (stating that "[n]ot only is education a new religion, but it rests on a specifically anti-Christian doctrine of man"). It has even been suggested that through public education the state obtains an ownership of children and that this could lead to future "takings" by the state. *Id.* at 329.

The critical issue is being increasingly recognized: statist education is the socialization of the child. If the state can own and socialize our children, then it can most certainly own and socialize our property. We cannot legitimately surrender our children to the state and its schools and then claim the right to withhold our property. The major concession makes objection to the lesser absurd, and an instance of misplaced values.

Id.

⁵⁴ BLUMENFELD, *supra* note 42, at 79-81; JESSIE WISE & SUSAN WISE BAUER, *THE WELL TRAINED MIND: A GUIDE TO CLASSICAL EDUCATION AT HOME* 414-16 (1999).

However, there are many other reasons parents choose to educate their children at home.⁵⁵ Some common reasons parents choose to home school include: the belief that their children will receive a better education, poor performance and dangerous environment of public schools, and dissatisfaction with and inability to afford private school.⁵⁶ Other parents choose to home school because they have children that are exceptionally bright or children with special learning needs.⁵⁷

The two main criticisms of home schooling are inferiority of education and lack of socialization.⁵⁸ The first criticism boils down to concern that home schooled children receive a substandard education since parents are not qualified to educate their children.⁵⁹ However,

⁵⁵ See BIELICK ET AL., *supra* note 45, at 11 tbl. 4 (showing the reasons parents surveyed gave for home schooling, the most frequently given reasons included religion and better education for children); ISHIZUKA, *supra* note 48, at xxxi-xxxii, 7-10 (describing the diversity of reasons for home schooling); ORR, *supra* note 39, at 8-10 (listing examples of the diverse reasons parents choose to home school); WHITEHEAD & CROW, *supra* note 37, at 129-35 (giving examples of the diverse reasons parents choose to home school); WISE & BAUER, *supra* note 54, at 580-82 (giving reasons for home education). Criticism of the quality of public education is nothing new or unique to home schoolers. ZACH. MONTGOMERY, POISON DROPS IN THE FEDERAL SENATE 38-42 (Gibson Bros. 1886), available at http://www.axon-family.net/kaleb/poison_drops/.

⁵⁶ See, e.g., BASHAM, *supra* note 39, at 9 (discussing performance and safety concerns); BIELICK ET AL., *supra* note 45, at 11 tbl. 4 (reporting 48.9% of home schoolers surveyed as giving better education for their children as their reason for home schooling and also reporting inability to afford private schools and other problems with available schools as reasons parents gave for home schooling); WHITEHEAD & CROW, *supra* note 37, at 131-32 (discussing poor academic standards of public schools as a motivation for home schooling).

⁵⁷ BLUMENFELD, *supra* note 42, at 105-11, 121-27 (discussing home schooling children with special educational needs, and specifically discussing whether home schooling can cure ADD); CARUANA, *supra* note 51, at 49-60 (providing reasons why home schooling can benefit all types of learners); ISHIZUKA, *supra* note 48, at 51-69 (providing tips on home schooling gifted children and children with special educational needs); ORR, *supra* note 39, at 204-24 (discussing home schooling children with special educational needs); see also IOWA CODE ANN. § 299A.9 (West 1996) (providing a separate statutory provision for home schooling children needing special education). Many point to Thomas Edison as an example of how well home education works for children with special educational needs. E.g., ISHIZUKA, *supra* note 48, at 51-52; ORR, *supra* note 39, at 210.

⁵⁸ E.g., ISHIZUKA, *supra* note 48, at 12; WHITEHEAD & CROW, *supra* note 37, at 137-76. The National Education Association ("NEA") has not supported homeschooling. BASHAM, *supra* note 39, at 13. The NEA has stated that they do not believe homeschooling can "provide the student with a comprehensive education experience." *Id.*

⁵⁹ See Bruce D. Page, Jr., Note, *Changing Our Perspective: How Presumptive Invalidity of Home School Regulations Will Further the State's Interest in an Educated Citizenry*, 14 REGENT U. L. REV. 181, 198-203 (2002) (discussing the argument that home schooled children receive a substandard education).

home schoolers consistently score above average on standardized tests.⁶⁰ In addition, many home schoolers successfully make the transition to college.⁶¹ Also, if home schooling parents want their children's curriculum to include subjects they are not qualified to teach, they have

⁶⁰ ISHIZUKA, *supra* note 48, at 12-16; Brian D. Ray & Jon Wartes, *The Academic Achievement and Affective Development of Home-Schooled Children*, in HOME SCHOOLING: POLITICAL, HISTORICAL, AND PEDAGOGICAL PERSPECTIVES, *supra* note 42, at 44-52; WHITEHEAD & CROW, *supra* note 37, at 141-59. *But see infra* note 98.

⁶¹ E.g., BASHAM, *supra* note 39, at 13; BLUMENFELD, *supra* note 42, at 112-20 (discussing home schoolers and college admission); ISHIZUKA *supra* note 48, at 339-64 (estimating that 30,000 home schoolers are applying to colleges and universities and noting that Amherst, Boston University, Brigham Young, Caltech, William and Mary, MIT, Northwestern, Oberlin, Princeton, Rice, St. John's, Swathmore, West Point, the Naval Academy, the Air Force Academy, University of Pennsylvania, Yale, Oxford, and Cambridge have all admitted home school graduates); KLIČKA, *supra* note 37, at 14-15; LEPPERT, *supra* note 38, at 165-83 (providing admissions tips for home schoolers); LLEWELLYN, *supra* note 39, at 283-306; ORR, *supra* note 39, at 173-75, 179-81; WISE & BAUER, *supra* note 54, at 656-63 (providing tips for homeschoolers in selecting and applying to colleges and universities). One study shows that about sixty-nine percent of home schooled students plan to attend a college or university. BASHAM, *supra* note 39, at 13. Many colleges and universities have admitted home schooled students and enrollment of home schooled students in the next decade is estimated at one million. *Id.* (noting that Harvard, Yale, Stanford, MIT, Rice, and the Citadel have all admitted home schoolers). *See generally* DAVID COLFAX & MICKI COLFAX, HOMESCHOOLING FOR EXCELLENCE (1988) (describing the experiences of the Colfax family as they home schooled their children, eventually sending them to Harvard).

In recent years, there has been some confusion regarding the eligibility of home school graduates for federal financial aid, resulting in some colleges and universities discriminating against home schoolers in their admissions policies. Cristina Daglas, *A Sheltered Education*, BADGER HERALD ONLINE, Jan. 24, 2003, at <http://www.badgerherald.com/vnews/display.v> (noting that some colleges refuse to admit home school graduates without a GED); Richard Morgan, *Homeschooling: Growing Force in Higher Education*, CHRON. OF HIGHER EDUC., Jan. 17, 2003, available at <http://www.hslda.org/docs/news/hslda/200301/200301161.asp> (discussing the ambiguity in the Department of Education's guidelines and how it has led to discrimination of home school graduates). There have been several attempts by Congress to resolve the ambiguity. E.g., H.R. 4866, 107th Cong. (2002); Home School Legal Defense Association, *Action Alert: End College Discrimination Permanently* (Sept. 3, 2002), at <http://www.hslda.org/elert/archive/2002109/20020903101725.asp>; Home School Legal Defense Association, *Breakthrough for Homeschoolers Seeking College Admission and Financial Aid* (Jan. 2, 2003), at <http://www.hslda.org/docs/news/hslda/200301/200301020.asp>; Home School Legal Defense Association, *Breakthrough for Young College-Bound Home School Graduates* (Apr. 30, 2002), at <http://www.hslda.org/docs/news/hslda/200204301.asp>; Home School Legal Defense Association, *H.R. 4866 - Fed Up Higher Education Technical Amendments of 2002* (June 17, 2002), at <http://www.hslda.org/legislation/national/2002/default.asp>; Home School Legal Defense Association, *Victory Over College Discrimination* (June 17, 2002), at <http://www.hslda.org/docs/news/hslda/200206170.asp>; National Center for Home Education, *Recognizing Home School Diplomas for College Admittance and Financial Aid* (Sept. 25, 2002), at <http://www.hslda.org/docs/nche/000001/00000147.asp>.

several options.⁶² One option is to join a home school co-op or group offering certain classes by either other home schooling parents or another person qualified to teach the subject.⁶³ Another option is to use video, online, or correspondence courses.⁶⁴ In addition, some public and private schools permit home schoolers to attend school part-time, and at some colleges and universities, home schoolers can earn credit by taking classes while they are still in high school.⁶⁵ Another resource for home schoolers may be extended family members willing to teach certain subjects in which they have some expertise.⁶⁶

Those who criticize home schooling because of socialization concerns argue that children who are home schooled will not develop the necessary social skills.⁶⁷ However, studies of home schoolers do not

⁶² See *infra* notes 63-66 and accompanying text.

⁶³ E.g., WISE & BAUER, *supra* note 54, at 651-52.

⁶⁴ E.g., ISHIZUKA, *supra* note 48, at 115-19, 324-25; WISE & BAUER, *supra* note 54, at 647-51, 653-55.

⁶⁵ ISHIZUKA, *supra* note 48, at 122-33, 343 (discussing the pros and cons of part-time enrollment and the option of taking Advanced Placement ("AP") courses at a local high school); LLEWELLYN, *supra* note 39, at 288-90; WISE & BAUER, *supra* note 54, at 652. In addition to taking college courses, some home schoolers earn college credit by taking College Level Examination Program ("CLEP") Exams. ISHIZUKA, *supra* note 48, at 343; WISE & BAUER, *supra* note 54, at 631-32.

⁶⁶ A close friend of mine, and her ten siblings, have and continue to supplement their home education with "classes" taught by their grandmother. Her grandmother has provided instruction for them in French, Spanish, and various other languages and subject areas. In addition, my friend's aunt and uncle, who also home school, have had their twelve children take classes from their grandmother.

For some home schoolers, finding family members to aid in instruction does not require going outside the immediate family. Fathers are beginning to take a more active role in home instruction, a role long dominated by mothers. ISHIZUKA, *supra* note 48, at 44-45; LEPPERT, *supra* note 38, at 51-60 (discussing the role of fathers in home education); see also CNN Student News, *More Dads Help with Homeschooling* (Jan. 22, 2003), at <http://www.cnn.com/2003/EDUCATION/01/22/homeschooling.fathers.ap/>. Also, siblings may benefit from participation in the instruction of each other. ISHIZUKA, *supra* note 48, at 38-40.

⁶⁷ Page, *supra* note 59, at 194-98. There are those who have even gone so far as to call home schooling "abuse." Michael Shearer, at <http://users.easystreet.com/hsms/> (on file with Valparaiso University Law Review). On his website, Michael Shearer describes his own negative home school experience. *Id.* In addition, Shearer points to several sources to support his argument that home schooling is "abuse," although few mention home education specifically. *Id.*; see also CONCISE ENCYCLOPEDIA OF PSYCHOLOGY 856 (Raymond J. Corsini & Alan J. Auerbach eds., 2d ed. 1996) (discussing social isolation); JOEL COVITZ, EMOTIONAL CHILD ABUSE: THE FAMILY CURSE (1986); JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD: STRATEGIES FOR IDENTIFICATION, ASSESSMENT, AND INTERVENTION 27-28 (1986) (discussing the effects of isolation); AMY WALLACE, THE

support this position.⁶⁸ The average home schooler participates in 5.2 activities outside the home per week, and ninety-eight percent of home schoolers are involved in at least two activities outside the home a week.⁶⁹

Despite the criticisms, home schooling is legal in every state.⁷⁰ Some states have specific home school statutes and other states permit home schooling through other general statutes.⁷¹ States also impose various amounts and types of regulations on home schoolers; however, in recent years the trend in most states has been to reduce the amount of regulation imposed on home schooling.⁷² This Part discusses state

PRODIGY (1986) (describing the life of William James Sidis, a child prodigy educated at home who had a nervous breakdown).

⁶⁸ BLUMENFELD, *supra* note 42, at 78; FARENGA, *supra* note 47, at 7-8; ISHIZUKA, *supra* note 48, at 17-18; WHITEHEAD & CROW, *supra* note 37, at 159-68; WISE & BAUER, *supra* note 54, at 589-93; *see also* BASHAM, *supra* note 39, at 14 (discussing research showing home schoolers are better adjusted and less peer dependant than public and private school students); BLUMENFELD, *supra* note 42, at 73 (suggesting that home schooled children have better social skills because they do not "learn their social skills from other kids"); ISHIZUKA, *supra* note 48, at 16 (suggesting that home education provides a more positive form of socialization); ORR, *supra* note 39, at 44 (suggesting that children can become peer dependent, competitive, and pressured from hours spent with other children the same age). *See generally* SUSANNAH SHEFFER, *A SENSE OF SELF: LISTENING TO HOMESCHOOLED ADOLESCENT GIRLS* (1995) (studying the socialization skills and self esteem of adolescent home schooled girls).

⁶⁹ BASHAM, *supra* note 39, at 11-13; *see also id.* at 13 (suggesting that home schoolers participate in "sports, scouts, church groups, ballet, Little League, neighbourhood play, part-time employment, . . . voluntary work . . . and day-time field trips and cooperative programs with groups of other home schooled students"); ORR, *supra* note 39, at 45 (2002) (suggesting that home schooled children can participate in activities with other children through 4H, Boy or Girl Scouts, YMCA, and church activities). Home schoolers in the city where I lived during most of my high school years had the opportunity to participate in home school athletic teams, which competed against the athletic teams of local private and religious high schools. Teams had been formed to compete in basketball and volleyball. In addition, there was a home school cheerleading squad and home school choir. Also, home school graduates in that city had the opportunity to participate in the annual home school graduation ceremony. *See e.g.*, Jennifer Grant, *Centerpiece: Cinderella for a Day*, NAPLES DAILY NEWS, Apr. 4, 2003, available at <http://web.naplesnews.com/03/04/neapolitan/d924737a.htm> (describing a home schooled student organizing a prom for home schoolers).

⁷⁰ *See infra* notes 75-77 and accompanying text.

⁷¹ *See infra* notes 75-77 and accompanying text.

⁷² KLICKA, *supra* note 37, at 164-65; Home School Legal Defense Association, *Dangerous Legislation Averted in Louisiana* (Jan. 28, 2003), at <http://www.hslda.org/hs/state/la/200301280.asp>; Home School Legal Defense Association, *Maine Homeschoolers Fight Against Repressive Regulations* (Feb. 5, 2003), at <http://www.hslda.org/hs/state/me/200302050.asp>. But *see* Home School Legal Defense Association, *Senate File 110: Required Academic Assessment for Homeschoolers* (Feb. 5, 2003), at

regulation of home schooling.⁷³ This Part then discusses state statutes that favor religious home schoolers by imposing fewer regulations on religious home schoolers than secular home schoolers.⁷⁴

1. State Regulation of Home Schooling

Thirty-six states have home schooling statutes.⁷⁵ Thirteen states and the District of Columbia allow home schooling under private tutor, private school, or religious school statutes.⁷⁶ Connecticut has no statute, but allows home schooling under the state's Department of Education procedures.⁷⁷ States also vary in the amount of regulation imposed on

<http://www.hslsda.org/Legislation/State/wy/2003/wysf110default.Asp> (on file with Valparaiso University Law Review).

⁷³ See *infra* Part II.A.1.

⁷⁴ See *infra* Part II.A.2.

⁷⁵ See ALASKA STAT. § 14.30.010(b)(12) (Michie 2002); ARIZ. REV. STAT. ANN. § 15-802 (West 2002); ARK. CODE ANN. § 6-15-501 (Michie 1999); COLO. REV. STAT. ANN. § 22-33-104.5 (West Supp. 2002); DEL. CODE ANN. tit. 14, § 2703 (1999); FLA. STAT. ANN. § 232.0201 (West Supp. 2003); GA. CODE ANN. § 20-2-690(c) (2001); HAW. REV. STAT. § 302A-1132(a)(5) (Supp. 2001); IOWA CODE ANN. §§ 299A.1-10 (West 1996 & Supp. 2003); LA. REV. STAT. ANN. § 17:236 (West 2001); ME. REV. STAT. ANN. tit. 20A, § 5001- A.3.A.(3) (West 1993); MD. CODE ANN., EDUC. § 7-301(a) (Supp. 2003); MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 1997); MINN. STAT. ANN. § 120A.22 (West Supp. 2003); MISS. CODE ANN. § 37-13-91(3)(c) (2001); MO. ANN. STAT. § 167.031.2 (West 2000); MONT. CODE ANN. § 20-5-102(2)(e) (2001); NEV. REV. STAT. ANN. 392.070 (Michie 2002); N.H. REV. STAT. ANN. § 193-A (1999); N.M. STAT. ANN. § 22-1-2(V) (Michie 2001); N.Y. EDUC. LAW § 3204(1) (McKinney 2001); N.C. GEN. STAT. §§ 115C-547 to 565 (2001); N.D. CENT. CODE § 15.1-20-04 (Supp. 2001); OHIO REV. CODE ANN. § 3321.04(A) (West 1999); OR. REV. STAT. §§ 339.030(1)(d), 035 (2001); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 1992); R.I. GEN. LAWS § 16-19-1 (Supp. 2002); S.C. CODE ANN. §§ 59-65-40-45-47 (Law. Co-op. 1990 & Supp. 2001); TENN. CODE ANN. § 49-6-3050 (2002); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (2000); VT. STAT. ANN. tit. 16, § 11(21) (1989); VA. CODE ANN. § 22.1-254.1 (Michie 2002); WASH. REV. CODE ANN. §§ 28A.225.010, 28A.200.010 (West 1997 & Supp. 2003); W. VA. CODE ANN. § 18-8-1 (Michie Supp. 2003); WIS. STAT. ANN. §§ 118.15(4), 165(1) (West 1999 & Supp. 2002); WYO. STAT. ANN. § 21-4-102 (Michie 2003).

⁷⁶ See ALA. CODE §§ 16-28-1(2), -3, -5, -7, -8 (2001); CAL. EDUC. CODE §§ 48222, 48224, 51745 (West 1993 & Supp. 2003); D.C. CODE ANN. § 38-202 (2001); IDAHO CODE § 33-202 (Michie 2001); 105 ILL. COMP. STAT. ANN. 5/26-1 (West 1998); IND. CODE §§ 20-8.1-3-17, 23-24, 34 (1998 & Supp. 2002); KAN. STAT. ANN. § 72-1111 (2002); KY. REV. STAT. ANN. § 159.030 (Banks-Baldwin 2002); MASS. GEN. LAWS ANN. ch. 76, § 1A (West 1996); NEB. REV. STAT. § 79-1601(2) (Supp. 2002); N.J. STAT. ANN. § 18A:38-25 (West 1999); OKLA. STAT. tit. 70, § 10-105(A) (1998); S.D. CODIFIED LAWS § 13-27-3 (Michie Supp. 2003); TEX. EDUC. CODE ANN. § 25.086(a)(1) (Vernon Supp. 2003).

⁷⁷ Connecticut Homeschool Network, Inc., *Law & Policy*, at <http://www.cthomeschoolnetwork.org/lawpolicy.htm> (last visited Apr. 23, 2004); Home School Legal Defense Association, *Homeschooling in the United States, A Legal Analysis: Connecticut*, at <http://www.hslsda.org/laws/analysis/CT.pdf> (last updated Aug. 2003).

home schooling.⁷⁸ While most constitutional challenges to the regulation of home schooling have been unsuccessful, the trend in most states is to impose fewer requirements on home schoolers.⁷⁹ In fact two states, Alaska and Idaho, allow home schooling to remain virtually unregulated.⁸⁰ Of those states that do regulate, common types of requirements include: notice, curriculum, attendance, standardized testing, record keeping, and parent education.⁸¹ Another type of requirement, teacher certification, is only used in a few states.⁸²

Thirty-nine states impose notice requirements on home schoolers.⁸³ These requirements typically require parents to provide some type of written notification to educational officials of their intent to home school at specified times.⁸⁴ Some states require a one-time notice, while others require annual notice.⁸⁵ Notice requirements are viewed by courts as minimal and have survived constitutional challenges.⁸⁶ However, in one

⁷⁸ See *infra* notes 80-121 and accompanying text (discussing the types of requirements states impose on home schoolers).

⁷⁹ KLICKA, *supra* note 37, at 158; see *infra* note 228 and accompanying text.

⁸⁰ ALASKA STAT. § 14.30.010(b)(12); IDAHO CODE § 33-202.

⁸¹ See *infra* notes 83-112 and accompanying text.

⁸² See *infra* notes 112-21 and accompanying text.

⁸³ ALA. CODE § 16-28-1(2), -3, -5, -7, -8 (2001); ARIZ. REV. STAT. ANN. § 15-802 (West 2002); ARK. CODE ANN. § 6-15-501 (Michie 1999); CAL. EDUC. CODE §§ 33190, 48222 (West 1993 & Supp. 2003); COLO. REV. STAT. ANN. § 22-33-104.5 (West Supp. 2002); DEL. CODE ANN. tit. 14, § 2703 (1999); FLA. STAT. ANN. § 232.0201 (West Supp. 2003); GA. CODE ANN. § 20-2-690(c) (2001); HAW. REV. STAT. § 302A-1132(a)(5) (Supp. 2001); IOWA CODE ANN. §§ 299A.1-10 (West 1996 & Supp. 2003); KAN. STAT. ANN. § 72-1111 (2002); KY. REV. STAT. ANN. § 159.030 (Banks-Baldwin 2002); LA. REV. STAT. ANN. § 17:236 (West 2001); MD. CODE ANN., EDUC. § 7-301(a) (Supp. 2003); ME. REV. STAT. ANN. tit. 20A, § 5001-A.3.A.(3) (West 1993); MASS. GEN. LAWS ANN. ch. 76, § 1A (West 1996); MINN. STAT. ANN. § 120A.22 (West Supp. 2003); MISS. CODE ANN. § 37-13-91(3)(c) (2001); MONT. CODE ANN. § 20-5-102(2)(e) (2001); NEB. REV. STAT. § 79-1601(2) (Supp. 2002); NEV. REV. STAT. ANN. 392.070 (Michie 2002); N.H. REV. STAT. ANN. § 193-A (1999); N.M. STAT. ANN. § 22-1-2(V) (Michie 2001); N.Y. EDUC. LAW § 3204(1) (McKinney 2001); N.C. GEN. STAT. §§ 115C-547 to -565 (2001); N.D. CENT. CODE § 15.1-20-04 (Supp. 2003); OHIO REV. CODE ANN. § 3321.04(A) (West 1999); OR. REV. STAT. §§ 339.030(1)(d), .035 (2001); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 1992); R.I. GEN. LAWS § 16-19-1 (Supp. 2002); S.D. CODIFIED LAWS § 13-27-3 (Michie Supp. 2003); TENN. CODE ANN. § 49-6-3050 (2002); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (2000); VT. STAT. ANN. tit.16, § 11(21) (1989); VA. CODE ANN. § 22.1-254.1 (Michie 2003); WASH. REV. CODE ANN. §§ 28A.200.010, 225.010 (West 1997 & Supp. 2003); W. VA. CODE ANN. § 18-8-1 (Michie 2003); WIS. STAT. ANN. §§ 118.15(4), .165(1) (West 1999 & Supp. 2002); WYO. STAT. ANN. § 21-4-102 (Michie 2003).

⁸⁴ GORDON ET AL., *supra* note 38, at 29.

⁸⁵ See *supra* note 83.

⁸⁶ GORDON ET AL., *supra* note 38, at 29-36; see, e.g., *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding the notice requirement).

case a notice requirement also requiring local school superintendent approval was struck down as unconstitutionally vague.⁸⁷

Another way some states regulate home schooling is to impose a curriculum requirement.⁸⁸ Curriculum requirements generally consist of

⁸⁷ *Jeffery v. O'Donnell*, 702 F. Supp. 516, 521 (M.D. Pa. 1988).

⁸⁸ ALA. CODE § 16-28-5 (requiring those home schooling under the private tutor statute to teach those subjects required in public schools); ARIZ. REV. STAT. ANN. § 15-802(A); CAL. EDUC. CODE § 48222 (requiring the same subjects as required in public schools and instruction must be in English); COLO. REV. STAT. ANN. § 22-33-104.5(3)(d) (requiring that the U.S. Constitution, reading, writing, speaking, math, history, civics, literature, and science be taught); CONN. GEN. STAT. ANN. § 10-184 (West 2002); DEL. CODE ANN. tit. 14, § 2703 (requiring that the same subjects be taught as public schools); GA. CODE ANN. § 20-2-690(c)(4) (requiring that curriculum include reading, language arts, math, social studies, and science); 105 ILL. COMP. STAT. ANN. 5/27-12, -21 to -22 (West 1998 & Supp. 2002) (requiring curriculum to include language arts, biological and physical science, fine arts, health and physical development, honesty, justice, kindness, and moral courage); KY. REV. STAT. ANN. § 158.080 (requiring curriculum to include reading, writing, spelling, grammar, history, mathematics, and civics); LA. REV. STAT. ANN. § 17:236-268 (requiring equivalent in quality to public schools including the Declaration of Independence and the Federalist papers); ME. REV. STAT. ANN. tit. 20A, § 5001-A.3.A.(3) (requiring subjects listed in the "Rules for Equivalent Instruction Programs"); MASS. GEN. LAWS ANN. ch. 76, § 1 (requiring reading, writing, English, geography, arithmetic, drawing, music, U.S. history, citizenship, health, physical education, and good behavior); MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 1997) (requiring "the subject areas of reading, spelling, mathematics, science, history, civics, literature, writing, and English grammar"); MINN. STAT. ANN. § 120A.22(9) (requiring reading, writing, literature, fine arts, math, science, history, geography, government, health, and physical education); MO. ANN. STAT. § 167.031.2(2)(b) (West 2000) (requiring reading, math, social studies, language arts, and science); MONT. CODE ANN. § 20-7-111 (requiring the same basic instructional program as public schools); NEB. REV. STAT. § 79-1601(2) (requiring language arts, math, science, social studies, and health); NEV. REV. STAT. ANN. 392.070 (requiring instruction equivalent to public schools); N.H. REV. STAT. ANN. § 193-A:4(I) (requiring science, mathematics, language, government, history, health, reading, writing, spelling, U.S. and state constitution, art, and music); N.J. STAT. ANN. § 18A:35-1 to 35-5 (West 1999) (requiring U.S. and N.J. history, civics, geography, citizenship, health, safety, and physical education unless there is a moral or religious objection); N.M. STAT. ANN. § 22-1-2(V) (requiring reading, language arts, mathematics, social studies, and science); N.Y. EDUC. LAW §§ 801, 804, 806, 808, 3204 (McKinney 2001 & Supp. 2003) (requiring subjects according to grade); N.D. CENT. CODE §§ 15.1-21-01, -23-04 (Supp. 2003) (requiring English language arts, mathematics, social studies, science, physical education, and health); OKLA. STAT. tit. 70, § 11-103 (Supp. 2003) (requiring reading, writing, math, science, citizenship, U.S. constitution, health, safety, physical education, and conservation); 24 PA. CONS. STAT. ANN. § 13-1327.1(c)(1)-(2) (requiring English, science, geography, civics, history, mathematics, art, music, physical education, health, and safety education); R.I. GEN. LAWS § 16-22-4 (2001) (requiring reading, writing, geography, arithmetic, history, government, English, health, and physical education); S.C. CODE ANN. §§ 59-65-40(A), -45, -47 (Law. Co-op. 1990 & Supp. 2002) (requiring reading, writing, math, science, and social studies for all grades and composition and literature for grades seven through twelve); S.D. CODIFIED LAWS § 13-27-3 (requiring language arts and math); TENN.

a broad description of subjects that must be taught.⁸⁹ In some states a curriculum requirement simply specifies the subjects that must be taught or requires parents to submit a list of texts that will be used.⁹⁰ In other states more detailed descriptions and lesson plans must be submitted.⁹¹

Thirty-one states and the District of Columbia have attendance requirements.⁹² Attendance requirements generally dictate either a

CODE ANN. § 49-6-3050 (requiring either college preparatory or general courses for grades nine through twelve); TEX. EDUC. CODE ANN. § 25.086(a)(1) (Vernon Supp. 2003) (requiring math, reading, spelling, grammar, and good citizenship); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (requiring the "branches prescribed by law"); VT. STAT. ANN. tit. 16, § 906 (requiring a "minimum course of study"); VA. CODE ANN. § 22.1-254.1 (requiring specific curriculum only under option 4); WASH. REV. CODE ANN. § 28A.225.010 (requiring occupational education, science, math, language, social studies, history, health, reading, writing, spelling, art, and music); W. VA. CODE ANN. § 18-28-3 (requiring English, grammar, reading, social studies, science, and math); WIS. STAT. ANN. § 118.165(d) (requiring reading, language arts, math, social studies, science, and health); WYO. STAT. ANN. § 21-4-101(a)(vi) (requiring reading, writing, math, civics, history, literature, and science); HAW. ADMIN. RULE § 8-12-15, available at <http://www.k12.hi.us/~oasis/systems/chapter12.html> (last visited Apr. 23, 2003) (requiring the curriculum "be structured and based on educational objectives as well as the needs of the child, be cumulative and sequential, provide a range of up-to-date knowledge and needed skills, and take into account the interests, needs, and abilities of the child" and providing suggested subjects); MD. REGS. CODE tit. 13A, § 10.01.01C(2), available at <http://www.dsd.state.md.us/comar/13a/13a.10.01.01.htm> (last visited Apr. 23, 2003) (requiring "studies usually taught in the public schools to children of the same age" including "English, math, science, social studies, art, music, health, and physical education"); OHIO ADMIN. CODE § 3301-34-03(A)(5), available at http://www.ode.state.oh.us/school_options/home-schooling/admincode.asp (last visited Apr. 23, 2003) (requiring language arts, geography, U.S. and state history, government, math, health, physical education, fine arts, first aid, and science).

⁸⁹ ISHIZUKA, *supra* note 48, at 104-05.

⁹⁰ *Id.* at 104; *see supra* note 88. In Wyoming, parents may exclude from the required subjects any topic contrary to their religious beliefs. WYO. STAT. ANN. § 21-4-101(a)(vi); *see infra* notes 143-44 and accompanying text; *see also infra* text accompanying notes 298-301.

⁹¹ E.g., 24 PA. CONS. STAT. ANN. § 13-1327.1(c)(1)-(2); ISHIZUKA, *supra* note 48, at 104.

⁹² ALA. CODE § 16-28-5 (requiring those home schooling under the private tutor statute to attend school 140 days per year for no fewer than three hours a day between 8:00 a.m. and 4:00 p.m.); COLO. REV. STAT. ANN. § 22-33-104.5 (requiring 172 days and an average of four hours of instruction per day); CONN. GEN. STAT. ANN. § 10-184 (requiring attendance when public school is in session); DEL. CODE ANN. tit. 14, § 2703A (requiring 180 days per year); D.C. CODE ANN. § 38-202(a) (2001) (requiring attendance during the period public schools are in session); GA. CODE ANN. § 20-2-690(c)(5) (requiring 180 days per year); IND. CODE § 20-8.1-3-17(d) (Supp. 2002) (requiring attendance for the same number of days as public schools); IOWA CODE ANN. § 299A.1 (West 1996 & Supp. 2003) (requiring 148 days per year); KAN. STAT. ANN. § 72-1111(a)(2) (Supp. 2002) (requiring a period of time "substantially equivalent" to public school); KY. REV. STAT. ANN. § 158.070(1) (requiring 185 days including the equivalent of 175 six-hour days); LA. REV. STAT. ANN. § 17:236 (requiring 180 days); ME. REV. STAT. ANN. tit. 20A, § 5001-A.3.A.(3) (requiring number of days listed in the "Rules for Equivalent Instruction Programs"); MO. ANN. STAT.

specific number of days or hours.⁹³ However, some states require a period of time substantially equivalent to public schools.⁹⁴

Standardized testing is required in some states and has survived constitutional challenge.⁹⁵ Some states require minimum scores on

§ 167.031.2(2)(b) (requiring 1,000 hours per year including a minimum of 600 hours of required subjects and at least 400 of those hours occurring at the regular location); MONT. CODE ANN. § 20-5-109(2) (requiring 180 days); NEB. REV. STAT. § 79-211 (requiring 1,032 hours for elementary students and 1,080 hours for high school students); N.M. STAT. ANN. § 22-12-2(B) (requiring the same length of school year as the public schools); N.Y. EDUC. LAW § 3204(2) (McKinney 2001) (requiring length substantially equivalent to public schools); N.C. GEN. STAT. §§ 115C-548, -556 (2001) (requiring nine months excluding reasonable holidays and vacations); N.D. CENT. CODE § 15.1-23-04 (Supp. 2003) (requiring 175 days a year for at least four hours a day); OKLA. STAT. tit. 70, § 1-109 (1998) (requiring 180 days); 24 PA. CONS. STAT. ANN. § 13-1327.1(c) (requiring 180 days or 900 hours for elementary and 990 hours for secondary); R.I. GEN. LAWS § 16-19-2 (requiring substantially equivalent length to public schools); S.C. CODE ANN. § 59-65-47(b) (Law. Co-op. Supp. 2002) (requiring 180 days); S.D. CODIFIED LAWS § 13-27-3 (Supp. 2003) (requiring a period of time equivalent to public schools); TENN. CODE ANN. § 49-6-3050(b)(3) (requiring 180 days); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (requiring same length of time as public schools); VA. CODE ANN. § 22.1-254(A) (requiring the same as public schools); WASH. REV. CODE ANN. §§ 28A.195.010(1), 150.220(1)(b), 225.010(4) (West 1997 & Supp. 2003) (requiring an average of 1,000 hours per year for grades 1-12); WIS. STAT. ANN. §§ 118.15(4), 165(c) (West 1999 & Supp. 2002) (requiring 875 hours per year); OHIO ADMIN. CODE § 3301-34-03(A)(8), available at http://www.ode.state.oh.us/school_options/home-schooling/admincode.asp (last visited Apr. 23, 2003) (requiring 900 hours); MD. REGS. CODE. tit. 13A, §§ 10.01.01.05, available at <http://www.dsd.state.md.us/comar/13a/13a.10.01.01.htm> (last visited Apr. 23, 2003) (requiring "sufficient duration to implement the instructional program" unless home schooling under the umbrella school option); NEV. ADMIN. CODE § 392.035 (requiring 180 days).

⁹³ Alabama, Colorado, Connecticut, Delaware, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, and Wisconsin require a specific number of days or hours. See *supra* note 92.

⁹⁴ The District of Columbia, Kansas, New Mexico, New York, Rhode Island, South Dakota, and Utah require a period of instruction similar to that of public schools. See *supra* note 92 and accompanying text.

⁹⁵ ARK. CODE ANN. § 6-15-504 (Michie 1999) (requiring standardized testing as required for public school students as long as the student is over two years beyond the normal age for their grade and paid for by the Department of Education unless approved alternate testing is used); COLO. REV. STAT. ANN. § 22-33-104.5(f) (requiring national standardized testing or evaluation by a qualified person selected by the students parent(s) for grades three, five, seven, nine, and eleven); FLA. STAT. ANN. § 232.0201(1)(c) (West Supp. 2003) (requiring annual testing or evaluation); GA. CODE ANN. § 20-2-690(c)(7) (requiring testing every three years beginning at the end of third grade); IOWA CODE ANN. § 299A.3 (requiring annual testing or evaluation); ME. REV. STAT. tit. 20A, § 5001-A.3.A.(3) (requiring testing or evaluation as provided in the "Rules for Equivalent Instruction Programs"); MINN. STAT. ANN. § 120A.22(11) (West Supp. 2003) (requiring testing unless parent is a licensed teacher, supervised by a licensed teacher, or passes a teacher competency exam);

standardized testing, while others merely require they be taken.⁹⁶ Some states requiring testing allow alternative methods of evaluating academic progress to be used in place of standardized testing.⁹⁷ Some have criticized standardized testing as a poor indicator of academic performance.⁹⁸ Also, standardized testing requirements may raise issues of equal protection and due process.⁹⁹

N.H. REV. STAT. ANN. § 193-A:6 (1999) (requiring testing, evaluation, or other equivalent measurement tool); N.C. GEN. STAT. § 115C-564 (requiring annual testing); N.D. CENT. CODE § 15.1-23-09 (requiring standardized testing for grades four, six, eight, and ten); OR. REV. STAT. § 339.035(3)-(5) (2001) (requiring testing at specific times depending on when the home education began and child's performance on testing); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (requiring testing in grades three, five, and eight); S.C. CODE ANN. § 59-65-40(D)-(A)(6) (requiring annual testing); S.D. CODIFIED LAWS § 13-27-3 (requiring testing in grades two, four, eight, and eleven); TENN. CODE ANN. § 49-6-3050(b)(5) (requiring testing in grades five, seven, and nine); VA. CODE ANN. § 22.1-254.1(C)-(D) (requiring annual testing or evaluation except under the religious exemption); WASH. REV. CODE ANN. § 28A.200.010(3) (requiring annual testing or evaluation); W. VA. CODE ANN. § 18-8-1(D) (Michie Supp. 2002) (requiring annual testing or evaluation); HAW. ADMIN. RULE § 8-12-18, available at <http://www.k12.hi.us/~oasis/systems/chapter12.html> (last visited Apr. 23, 2004) (requiring an annual report including testing or evaluation and requiring testing for grades three, five, eight, and ten); N.Y. COMP. CODE R. & REGS. tit. 8, § 100.10(h), WL 2003 8 NY ADC 100.10 (requiring testing or evaluation every other year for grades four through eight and every year for grades nine through twelve); OHIO ADMIN. CODE § 3301-34-04, available at http://www.ode.state.oh.us/school_options/home-schooling/admincode.asp (last visited Apr. 23, 2004) (requiring testing or alternate means of assessment); see *Murphy v. Arkansas*, 852 F.2d 1039, 1041-44 (8th Cir. 1988) (upholding testing requirement challenged under Free Exercise Clause, Equal Protection Clause, and right of privacy); *Null v. Bd. of Educ.*, 815 F. Supp. 937, 939-40 (S.D. W. Va. 1993) (upholding testing requirement challenged under the Free Exercise, Due Process, and Equal Protection Clauses); *In re Welfare of T.K.*, 475 N.W.2d 88, 92-93 (Minn. Ct. App. 1991). See generally Eric W. Schulze, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 ED. L. REP. 583, 594-95 (1999) (discussing testing requirements for home schoolers).

⁹⁶ See *supra* note 95 and accompanying text.

⁹⁷ Colorado, Florida, Hawaii, Iowa, Maine, New Hampshire, New York, Ohio, Virginia, Washington, and West Virginia all allow alternate means of evaluation to be used. See *supra* note 95; see also *supra* note 57 and accompanying text.

⁹⁸ ESTELLE S. GELLMAN, *SCHOOL TESTING: WHAT PARENTS AND EDUCATORS NEED TO KNOW* 1-41 (1995) (questioning what standardized tests actually measure and the accuracy of testing); RUTH MITCHELL, *TESTING FOR LEARNING: HOW NEW APPROACHES TO EVALUATION CAN IMPROVE AMERICAN SCHOOLS*, at vii-25 (1992) (suggesting assessment be used for evaluation instead of multiple choice standardized testing); PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 95-116 (1999).

⁹⁹ Debra J. Madsen, *Legal Issues in Standardized Achievement Testing*, in *EDUCATIONAL TESTING: ISSUES AND APPLICATIONS* 225, 225-39 (Kathy E. Green ed., 1991).

Another type of requirement is record keeping.¹⁰⁰ In some states the requirement is only maintenance, and not submission, of records.¹⁰¹ In other states, records must be submitted on a regular basis, typically every year.¹⁰² The type of records that must be kept can vary from attendance and standardized testing records to immunization records.¹⁰³

¹⁰⁰ ALA. CODE § 16-28-5, 8 (2001) (requiring those home schooling under the private tutor statute to make reports in addition to the keeping of records required of all homeschoolers); CAL. EDUC. CODE § 48222 (West 1993) (requiring an attendance register be kept); COLO. REV. STAT. ANN. § 22-33-104.5(a) (requiring attendance records be kept); D.C. CODE ANN. § 31-403 (2001) (requiring a daily record be kept); FLA. STAT. ANN. § 232.0201(b) (requiring a portfolio of records be maintained); GA. CODE ANN. § 20-2-690(c)(6), (8) (requiring attendance records to be submitted monthly and an annual progress report created); IND. CODE § 20-8.1-3-23 (1998) (requiring that attendance records be kept); KY. REV. STAT. ANN. § 159.040 (Banks-Baldwin 2002) (requiring attendance register and scholarship reports); MINN. STAT. ANN. § 120A.22 (requiring quarterly reports unless parent is a licensed teacher, is supervised by a licensed teacher, has passed a teacher competency exam, has a bachelors degree, or instruction is provided in a accredited school); MO. ANN. STAT. § 167.031.2 (West 2000) (requiring maintenance but not submission of a record of the subjects taught, samples of academic work, evaluations, or equivalent credible evidence); MONT. CODE ANN. § 20-5-109 (2001) (requiring maintenance of attendance and immunization records); N.M. STAT. ANN. § 22-1-2.1 (Michie 2001) (requiring immunization records unless religious objection); N.C. GEN. STAT. §§ 115C-548, -556 (requiring parents to keep attendance and immunization records); N.D. CENT. CODE § 15.1-23-05 (Supp. 2001) (requiring parents to keep a record of courses and academic progress); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (requiring a portfolio be maintained); R.I. GEN. LAWS § 16-19-2 (Supp. 2002) (requiring an attendance register be kept); S.C. CODE ANN. § 59-65-40(A)(4) (requiring records to be maintained of subjects taught and academic evaluations); TENN. CODE ANN. § 49-6-3050(b)(2) (requiring attendance records be maintained and submitted annually); WASH. REV. CODE ANN. § 28A.200.010(3) (requiring records of standardized tests or evaluations be maintained); HAW. ADMIN. RULE § 8-12-15, available at <http://www.k12.hi.us/~oasis/systems/chapter12.html> (last visited Apr. 22, 2004) (requiring a record be kept of planned curriculum); N.Y. COMP. CODE R. & REGS. tit. 8, § 100.10, WL 2003 8 NY ADC 100.10 (requiring attendance records to be maintained and reports be filed); MD. REGS. CODE tit. 13A, §§ 10.01.01-05, available at <http://www.dsd.state.md.us/comar/13a/13a.10.01.01.htm> (last visited Apr. 23, 2004) (requiring a portfolio be maintained unless home schooling under the umbrella option); Connecticut Homeschool Network, Inc., *Law & Policy*, at <http://www.cthomeschoolnetwork.org/lawpolicy.htm> (last visited Apr. 23, 2004); Home School Legal Defense Association, *Homeschooling in the United States, A Legal Analysis: Connecticut*, at <http://www.hslda.org/laws/analysis/CT.asp> (last updated Aug. 2003).

¹⁰¹ California, Colorado, D.C., Florida, Hawaii, Indiana, Maryland, Minnesota, Missouri, Montana, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Washington, require maintenance. See *supra* note 100.

¹⁰² Alabama, Georgia, Kentucky, and New York require submission. See *supra* note 100.

¹⁰³ See *supra* note 100.

However, only twenty-two states and the District of Columbia have imposed record keeping requirements.¹⁰⁴

Some states have parental education level requirements.¹⁰⁵ In some states the requirement is that the teaching parent have a high school diploma or equivalent ("GED").¹⁰⁶ Other states require a baccalaureate degree.¹⁰⁷ However, the requirement of a baccalaureate degree is usually one of several options for meeting an instructor qualification requirement, although meeting the requirement with a baccalaureate degree, rather than other options, may exempt the home schooler from other requirements.¹⁰⁸ Although there is an increase in standardized test scores among children home schooled by a parent with a baccalaureate degree, those home schooled by parents without a baccalaureate degree, even those who had not completed high school, still average

¹⁰⁴ See *supra* note 100.

¹⁰⁵ GA. CODE ANN. § 20-2-690(c)(3) (requiring the teaching parent to have a high school diploma or equivalent); N.M. STAT. ANN. § 22-1-2.1(C) (requiring a high school diploma or equivalent); N.C. GEN. STAT. § 115C-564 (requiring parent to have a high school diploma or equivalent); N.D. CENT. CODE §§ 15.1-23-03, 15.1-23-06 (Supp. 2001) (requiring a baccalaureate degree or a high school diploma with monitoring unless the parent has a teaching certificate or sufficient score on the national teacher exam); 24 PA. CONS. STAT. ANN. § 13-1327.1(a) (requiring a high school diploma or equivalent); S.C. CODE ANN. § 59-65-40(A)(1) (requiring high school diploma, GED, or baccalaureate degree); TENN. CODE ANN. § 49-6-3050 (requiring different levels depending on which home schooling option and grade level of children being taught); VA. CODE ANN. § 22.1-254.1 (Michie 2002) (requiring different levels of education depending on which home schooling option is chosen); WASH. REV. CODE ANN. § 28A.225.010(4) (West 1997 & Supp. 2003) (requiring 45 college quarter credits or equivalent semester credits of college unless certificated, supervised by a certificated person, or deemed qualified by the superintendent of the school district); W. VA. CODE ANN. § 18-8-1(c)(2)(B) (Michie Supp. 2002) (requiring under the notice option a high school diploma or equivalent and at least four years of formal education beyond the children being instructed); OHIO ADMIN. CODE § 3301-34-03(A)(9), available at http://www.ode.state.oh.us/school_options/home-schooling/admincode.asp? (last visited Apr. 23, 2004) (requiring high school diploma, equivalent of a high school diploma, or supervision). Some states impose qualification requirements other than education requirements or teacher certification. CAL. EDUC. CODE § 48222 (requiring that instructors must be capable of teaching); KAN. STAT. ANN. § 72-1111(a)(2) (Supp. 2001) (requiring parent to be a "competent" teacher); NEV. REV. STAT. ANN. 392.025 (Michie 2002) (requiring parent to either be a certified teacher, have provided home instruction for at least three years, consult with a licensed teacher or a person who has provided home instruction for at least three years, enroll student in an approved correspondence course, or receive a waiver); N.Y. EDUC. LAW § 3204(2) (McKinney 2001) (requiring competency).

¹⁰⁶ Georgia, New Mexico, and North Carolina are examples of states requiring high school diploma or equivalent. See *supra* note 105.

¹⁰⁷ North Dakota, South Carolina, and Virginia are examples of states with options requiring a baccalaureate degree. See *supra* note 105.

¹⁰⁸ See *supra* note 105.

standardized test scores between the 80th and 90th percentile.¹⁰⁹ In addition, in comparing standardized test scores of students with parents who have not completed high school, home schooled students averaged fifty-five percentile points higher than public school students.¹¹⁰ Based on standardized testing, lack of parental education appears to have a less significant negative effect on student academic performance for home school students than public school students.¹¹¹ Also, the fact that thirty-nine states and the District of Columbia do not impose any parental education requirements may be an indication that many states do not see the requirement as an accurate indicator of parental ability to supervise a home education program.¹¹²

Teacher certification is also a type of home school requirement.¹¹³ Requiring teacher certification is likely the heaviest burden the state can impose on home schoolers because it disqualifies virtually all parents.¹¹⁴ Even courts have acknowledged the heavy burden teacher certification requirements place on home schoolers.¹¹⁵ Teacher certification has not been shown to improve academic performance.¹¹⁶ In fact, some states do not require teacher certification for public and private school teachers.¹¹⁷ In addition, some have questioned the effectiveness of teacher certification requirements in promoting the state's interest in educating its citizens.¹¹⁸ In the few states still using teacher certification as a requirement, it is usually one of several options for parents to meet the state requirements to home school; however, in Alabama, teacher certification is a requirement for all home schoolers who do not qualify as a church school.¹¹⁹ In Michigan, a teacher certification requirement

¹⁰⁹ BASHAM, *supra* note 39, at 11-12.

¹¹⁰ *Id.* at 12. But see *supra* note 98 and accompanying text.

¹¹¹ BASHAM, *supra* note 39, at 12.

¹¹² See *supra* note 105.

¹¹³ See *infra* note 119; see also KLICKA, *supra* note 37, at 137-38.

¹¹⁴ GORDON ET AL., *supra* note 38, at 37.

¹¹⁵ E.g., *People v. DeJonge*, 501 N.W.2d 127, 140-41 (Mich. 1993).

¹¹⁶ *Id.* at 141; BASHAM, *supra* note 39, at 11.

¹¹⁷ *DeJonge*, 501 N.W.2d at 142-43.

¹¹⁸ *Id.* at 142.

¹¹⁹ ALA. CODE § 16-28-5 (2001) (requiring teacher certification under the private tutor statute); CAL. EDUC. CODE § 48224 (West 1993) (allowing the option of home schooling under the state's private tutor statute as an alternative statute permitting home schooling); COLO. REV. STAT. ANN. § 22-33-104(2)(i) (West Supp. 2002) (allowing the option of home schooling under the state's private tutor statute as an alternative statute permitting home schooling); IOWA CODE ANN. § 299A.2 (West 1996 & Supp. 2002) (allowing an option of meeting a requirement of the home school statute with a teaching license); MICH. COMP. LAWS ANN. § 380.1561(3)(a) (West 1997) (allowing an option to home school as a state

was found unconstitutional when applied to religious home schoolers, but not unconstitutional when applied to secular home schoolers.¹²⁰ However, in Alabama, Iowa, and North Dakota, teacher certification requirements survived Free Exercise challenges.¹²¹

Although the requirements imposed on home schoolers vary from state to state, in most states the regulation of home schooling is religion-neutral.¹²² However, in some states religious home schoolers are not subjected to the same requirements imposed on other home schoolers.¹²³ This Note next discusses those states favoring religious home schoolers by exempting them from certain regulations imposed on other home schoolers.¹²⁴

approved nonpublic school); NEV. REV. STAT. ANN. 392.015(1) (Michie 2002) (allowing teacher certification as one option for meeting the instructor requirements); N.D. CENT. CODE § 15.1-20-02 (Supp. 2003) (allowing the option of home schooling as an approved private school); 24 PA. CONS. STAT. ANN. § 13-1327(b) (West 1992) (allowing the option of home schooling under the private tutor statute); VA. CODE ANN. § 22.1-254 (Michie 2002) (allowing teacher certification as one option for meeting the instructor requirements and allowing the option to home school under the private tutor statute); WASH. REV. CODE ANN. §§ 28A.225.010(4), 200.010 (West 1997 & Supp. 2003) (allowing teacher certification as an option for meeting instructor requirements); see also KLUCKA, *supra* note 37, at 137-38.

¹²⁰ *People v. Bennett*, 501 N.W.2d 106, 120 (Mich. 1993); *DeJonge*, 501 N.W.2d at 143-144; see *infra* note 227. See generally Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733 (1990); Douglas G. McCray, Note, *People v. Bennett: Are Teacher Certification Requirements for Secular Home Educators Constitutional?*, 42 WAYNE L. REV. 259 (1995); Joseph P. Tocco, Note, *Home Schooling in Michigan: Is There a Fundamental Right to Teach Your Children at Home?*, 71 U. DET. MERCY L. REV. 1053 (1994).

¹²¹ *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 496-98 (8th Cir. 1987) (refusing to extend the "Amish exemption" to exempt religious schools from teacher certification requirement); *Jernigan v. State*, 412 So. 2d 1242, 1247 (Ala. Crim. App. 1982) (rejecting a Free Exercise challenge to the Alabama teacher certification requirement); *State v. Toman*, 436 N.W.2d 10 (N.D. 1989); *State v. Melin*, 428 N.W.2d 227 (N.D. 1988); *State v. Anderson*, 427 N.W.2d 316, 324-25 (N.D. 1988) (upholding a teacher certification requirement against Free Exercise and Establishment Clause claims); *State v. Patzer*, 382 N.W.2d 631 (N.D. 1986); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980); see also *People v. Turner*, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953) (upholding teacher certification requirement); *Sheridan Rd. Baptist Church v. Dept. of Educ.*, 396 N.W.2d 373, 383 (Mich. 1986) (upholding a teacher certification requirement, prior to the *DeJonge* case, when challenged under the First Amendment religion clauses).

¹²² See *supra* notes 83-121 and accompanying text (describing the types of requirements states impose on homeschoolers).

¹²³ See *infra* Part II.A.2.

¹²⁴ See *infra* Part II.A.2.

2. States Favoring Religious Home Schoolers

Alabama, Virginia, and Wyoming impose fewer regulations on religious home schoolers.¹²⁵ Alabama does not have a home school statute, but permits home schooling under its statutes for church schools¹²⁶ and private tutors.¹²⁷ Under the private tutor statute, parents

¹²⁵ ALA. CODE §§ 16-28-1(2), -5 (2001); VA. CODE ANN. §§ 22.1-254(B)(1), -254.1(D) (Michie 2003); WYO. STAT. ANN. §§ 21-4-101(a)(vi), -102(b) (Michie 2001); see *supra* Part I. Other states make a distinction between religious and secular home schoolers, but do not impose requirements that substantially favor religious home schoolers. In Kansas, there is a statute allowing a religious exemption from compulsory attendance for high school students. KAN. STAT. ANN. § 72-1111(e) (Supp. 2002). However, this exemption requires an approval process not required for home schooling as a non-accredited private school, and the process would likely impose similar if not greater requirements. *Id.* Maryland allows home schooling supervised by a church school, but also allows similar supervision under a state approved correspondence course. MD. REGS. CODE tit. 13A, § 10.01.05, available at <http://www.dsd.state.md.us/comar/13a/13a10.01.03.htm> (last visited Apr. 23, 2004). Michigan allows an exemption from the teacher certification requirement for religious home schoolers under the nonpublic school statute; however, even with the exemption there are more requirements imposed on home schoolers operating as a nonpublic school than those home schooling under the religion-neutral statute permitting home education programs. MICH. COMP. LAWS ANN. § 380.1561(3)(a) (West 1997). In addition, prior to the statute permitting home education programs, the teacher certification requirement was found unconstitutional as applied to religious home schoolers. *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (holding teacher certification unconstitutional because it violates the Free Exercise Clause of the First Amendment). It is possible that any Establishment Clause problem with the Michigan exemption could be rescued by a Free Exercise defense; however, because both religious and secular home schoolers are able to home school with fewer restrictions as home education programs there does not seem to be much, if any, preference towards religion and there may not be an Establishment Clause problem at all. See *infra* Part II.B.2. North Carolina allows home schoolers the option of operating as a church school; however, the requirements are basically the same as the similar option offered to home schoolers of operating as a nonpublic school. N.C. GEN. STAT. §§ 115C-547 to -562 (2001).

¹²⁶ ALA. CODE § 16-28-1(2). The statute states:

(2) CHURCH SCHOOL. Includes only such schools as offer instruction in grades K-12, or any combination thereof including the kindergarten, elementary, or secondary level and are 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.

Id. See generally William L. Campbell, Jr., *Moving Against the Tide: An Analysis of Home School Regulation in Alabama*, 52 ALA. L. REV. 649 (2001).

¹²⁷ ALA. CODE § 16-28-5. The statute states:

Instruction by a private tutor means and includes only instruction by a person who holds a certificate issued by the State Superintendent of Education and who offers instruction in the several branches of study required to be taught in the public schools of this state, for at least three hours a day for 140 days each calendar year, between the

who educate their children at home are required to obtain teacher certification.¹²⁸ In addition, parents home schooling under the private tutor statute must hold classes a specified number of days between specified hours, include specified subjects in their curriculum, file a statement with the local superintendent, and maintain records of their children's work and attendance.¹²⁹ However, under Alabama's church school statute, religious parents may home school by filing a one-time attendance form,¹³⁰ keeping an attendance record,¹³¹ and obtaining sponsorship from their church or a similar religious organization.¹³²

In Virginia, home schooling is permitted under the state's home school statute.¹³³ The statute provides four options under which parents

hours of 8:00 A.M. and 4:00 P.M., and who uses the English language in giving instruction. Such private tutor shall, prior to beginning of the instruction of any child, file with the county superintendent of education, where his place of instruction is in territory under the control and supervision of the county board of education, or the city superintendent of schools, where his place of instruction is in territory under the control and supervision of a city board of education, a statement showing the child or children to be instructed, the subjects to be taught and the period of time such instruction is proposed to be given. Such tutor shall 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.

Id.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* § 16-28-7.

¹³¹ *Id.* § 16-28-8.

¹³² *Id.* § 16-28-7; see also *id.* § 16-28-1(2). See generally Mark Murphy, Note, *A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?*, 8 GA. ST. U. L. REV. 457, 473-79 (1992) (discussing the Alabama statutes as applied to home education).

¹³³ VA. CODE ANN. § 22.1-254.1(A)-(D) (Michie 2003). The statute states:

A. When the requirements of this section have been satisfied, instruction of children by their parents is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of a child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Superintendent of Public Instruction; or (iv) provides a program of study or curriculum which, in the judgment of the division

may home school their children: (1) if the parent has a baccalaureate degree, (2) if the parent is a certified teacher, (3) if the parent uses an approved correspondence course, or (4) if evidence is submitted of the parent's ability to teach curriculum meeting the state's objectives.¹³⁴ In addition, parents are required to hold classes 180 days a year, file annual notice, submit annual standardized test results, and provide a description of the curriculum that will be used.¹³⁵ However, Virginia also has a religious exemption statute.¹³⁶ Under the religious exemption,

superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.

B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction as required by subsection A of this section. Effective July 1, 2000, parents electing to provide home instruction shall provide such annual notice no later than August 15. Any parent who moves into a school division after the school year has begun shall notify the division superintendent of his intention to provide home instruction as soon as practicable and shall comply with the requirements of this section within thirty days of such notice. The division superintendent shall notify the Superintendent of Public Instruction of the number of students in the school division receiving home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score in or above the fourth stanine on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation or assessment which, in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

D. For purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-254(B)(1).

Id. Parents in Virginia may also home school under the private tutor statute, but must obtain teacher certification. *Id.* § 22.1-254(A). In addition, home schoolers may create a private school; however, this requires more than one individual home school. *Id.*

¹³⁴ *Id.* § 22.1-254.1(A).

¹³⁵ *Id.* § 22.1-254.1.

¹³⁶ *Id.* § 22.1-254(B)(1). The statute states:

B. A school board shall excuse from attendance at school:

parents may home school by providing a one-time notice of intent, and without meeting the requirements other home schoolers must meet.¹³⁷

Wyoming allows home schooling under a home school statute.¹³⁸ Under the statute, parents home schooling their children must provide annual notice that specific subjects are included in their curriculum.¹³⁹ However, Wyoming statutes create two religion-based exemptions for home schoolers.¹⁴⁰ One exemption allows religious home schools to be considered a church school if they are sponsored or controlled by a church or denomination.¹⁴¹ If a home school is considered a church school, it is exempt from state regulation and does not have to submit

1. Any pupil who, together with his parents, by reason of bona fide religious training or belief is conscientiously opposed to attendance at school. For purposes of this subdivision, "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code

Id.; see also *id.* §§ 22.1-254.1(D), -254(H)(5); *Johnson v. Prince William County Sch. Bd.*, 404 S.E.2d 209, 211-12 (Va. 1991). The test for determining if a home schooler is entitled to the exemption is the "bona fides of their religious beliefs." *Johnson*, 404 S.E.2d at 211. If the School Board determines that a request is a "bona fides religious request" the religious exemption will be granted. *Id.* at 212.

¹³⁷ VA. CODE ANN. § 22.1-254(B)(1).

¹³⁸ WYO. STAT. ANN. § 21-4-102(b) (Michie 2001). The statute states:

A home-based educational program shall meet the requirements of a basic academic educational program pursuant to W.S. 21-4-101(a)(vi). It shall be the responsibility of every person administering a home-based educational program to submit a curriculum to the local board of trustees each year showing that the program complies with the requirements of this subsection. Failure to submit a curriculum showing compliance is prima facie evidence that the home-based educational program does not meet the requirements of this article.

Id.

¹³⁹ *Id.* § 21-4-101(a)(vi) (requiring reading, writing, math, civics, history, literature, and science).

¹⁴⁰ *Id.* § 21-4-101(a)(iv), (vi).

¹⁴¹ *Id.* § 21-4-101(a)(iv). The statute states:

"Parochial, church or religious school" is one operated under the auspices or control of a local church or religious congregation or a denomination established to promote and promulgate the commonly held religious doctrines of the group though it may also include basic academic subjects in its curriculum. Nothing contained in W.S. 21-4-102(b), 21-2-401 or 21-2-406 grants to the state of Wyoming or any of its officers, agencies or subdivisions any right or authority to control, manage, supervise or make any suggestions as to the control, management or supervision of any parochial, church or religious school

Id.

notice of compliance with curriculum requirements.¹⁴² The other religion-based exemption allows those home schooling under the home school statute to exclude from their curriculum any "topic, concept or practice" inconsistent with the home schooler's religious beliefs.¹⁴³ Under this curriculum exemption, the home schooler is not exempt from the entire requirement, only those topics that conflict with his or her religious beliefs, and the home schooler is not required to obtain church sponsorship.¹⁴⁴ Like the statutes in Alabama and Virginia, the Wyoming statutes impose fewer requirements on religious home schoolers.¹⁴⁵ These religion-based exemptions may conflict with the First Amendment religion clauses.¹⁴⁶ To explain how these exemptions may be unconstitutional, Part II.B provides a discussion of the Establishment and Free Exercise Clauses of the First Amendment.¹⁴⁷

B. The Religion Clauses of the First Amendment

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁴⁸ The first clause is referred to as the "Establishment Clause" and the other as the "Free Exercise Clause."¹⁴⁹ While both clauses

¹⁴² *Id.* § 21-4-101(a)(iv), (vi).

¹⁴³ *Id.* § 21-4-101(a)(vi) (stating "[t]hese curriculum requirements do not require any private school or home-based educational program to include in its curriculum any concept, topic or practice in conflict with its religious doctrines or to exclude from its curriculum any concept, topic or practice consistent with its religious doctrines").

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* Part II.A.2.

¹⁴⁶ See *infra* Part III.

¹⁴⁷ See *infra* Part II.B.

¹⁴⁸ U.S. CONST. amend. I. Religious beliefs are valid based on the sincerity, and not the truth of the belief. *United States v. Ballard*, 322 U.S. 78, 81 (1944). It is important to note that when sincerely held religious beliefs are protected by the religion clauses, they do not need to be in conformity with the claimed religion of the holder of those beliefs. *Frazee v. Ill. Employment Sec. Dep't*, 489 U.S. 829, 832-33 (1989) (stating that "[n]ever did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed personal preference rather than religious belief"); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) (stating that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"); *Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 314 (5th Cir. 1977) (stating "[o]ur opinion today is not to be taken as requiring or suggesting that religious beliefs be institutionalized in order to be eligible for First Amendment protection. Indeed, they need not be.").

¹⁴⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1237 (2001).

protect freedom of religion, they at times appear to be in conflict.¹⁵⁰ Due to this tension between the religion clauses, under some circumstances it is impossible to analyze a situation under the Establishment Clause without looking at the Free Exercise Clause as well.¹⁵¹ At times, what would otherwise be an Establishment Clause violation may be constitutional to avoid violating the Free Exercise Clause.¹⁵² To explain how the two clauses apply to religious exemptions, Part II.B.1 begins by discussing the Establishment Clause.¹⁵³ Part II.B.2 then discusses the Free Exercise Clause, focusing on when the Free Exercise Clause creates a "defense" to what would otherwise be an Establishment Clause violation.¹⁵⁴

1. The Establishment Clause

In early Establishment Clause cases, the Supreme Court implied a doctrine of "separation between Church and State."¹⁵⁵ In 1971, the

¹⁵⁰ *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970); CHEMERINSKY, *supra* note 149, at 1237-38; JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 35 (2002). In *Walz*, the Court stated:

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other . . . [t]he course of constitutional neutrality in this are cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 668-89.

¹⁵¹ See *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 715 (N.J. 1997). The Free Exercise and Establishment Clauses cannot be "easily divided and put into separate pigeon holes." *Catholic High Sch. Ass'n of the Archdiocese v. Culvert*, 753 F.2d 1161, 1166 (2d Cir. 1985). In some cases both the Free Exercise and Establishment Clauses must be analyzed together because "there has been some blurring of sharply honed differentiations." *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977); see also DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789: CONTRIBUTIONS TO ORIGINAL INTENT 9 (2000).

¹⁵² See *infra* Part II.B.2.

¹⁵³ See *infra* Part II.B.1.

¹⁵⁴ See *infra* Part II.B.2.

¹⁵⁵ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (involving a Free Exercise claim)). The phrase "separation between

Supreme Court developed the *Lemon* Test for evaluating Establishment Clause issues; however, while there continues to be indications of adherence to the *Lemon* Test, the Court has at least suggested the use of other tests in analyzing Establishment Clause challenges.¹⁵⁶ Currently there are three approaches developed by the Supreme Court for

Church and State" does not appear in the Constitution or any of its amendments. OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 532-33 (2d ed. 1999) (stating that the wall of separation metaphor was adopted by the Supreme Court). The phrase comes from a letter written by Thomas Jefferson in 1802. 16 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 281-82 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904). *But see* DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 71-82 (New York University Press 2002) (discussing references to the "wall" metaphor prior to Jefferson's use). Jefferson penned the letter to explain his refusal to issue what he saw as "religious proclamations" calling for prayer and fasting. *Id.* at 27. The phrase was published soon after it was written, but had nearly been forgotten until it appeared in *Everson*. *Id.* at 5. One criticism of the use of the wall metaphor is that Jefferson did not think the metaphor "expressed a universal principle, encapsulated the most salient features of his church-state views, or was his definitive word on the First Amendment." *Id.* at 54. There is no record of Jefferson using the metaphor again in later expressions of his views on the constitutional relationship between church and state. *Id.*

There is no evidence that Jefferson considered the metaphor the quintessential symbolic expression of his church-state views. There is little evidence to indicate that Jefferson thought the metaphor encapsulated a *universal* principle of religious liberty or of the prudential relationships between religion and *all* civil government (local, state, and federal). There is so much evidence, as set forth in this chapter, that the "wall" has been used in ways—rhetorically and substantively—that its architect almost certainly would not have recognized and, perhaps, would have repudiated.

Id. at 69-70. The metaphor has not been without its critics and continues to receive criticism from Supreme Court justices. *Id.* at 103-06; *see also* TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 117 (1998) (stating that "[t]his Jeffersonian dominance of First Amendment theory is historically untenable . . . if anything, the First Amendment owes more to evangelical passion than to Enlightenment skepticism"); Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 988-91 (1996) (discussing the "Jefferson-Story debate").

¹⁵⁶ *E.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 718-20 (1994) (O'Connor, J., concurring) (stating that "[i]t is always appealing to look for a single test [but] . . . [e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test); *see infra* notes 162-88; *see also* Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation*, 33 TEX. TECH. L. REV. 435, 456-57 (2002); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 693 (2002).

analyzing Establishment Clause cases.¹⁵⁷ However, there is some confusion surrounding Establishment Clause jurisprudence due to the Court's unwillingness to choose one approach.¹⁵⁸

¹⁵⁷ See *infra* notes 162-88 and accompanying text (discussing the *Lemon*, Endorsement, and Coercion Tests). Although there are three tests, the Court (at least recently) does appear to emphasize neutrality towards religion in analyzing state actions under the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Mitchell v. Helms*, 530 U.S. 793, 838 (2000) (O'Connor, J., concurring) (stating "I do not quarrel with the plurality's recognition that neutrality is an important for upholding . . . programs against Establishment Clause challenges"); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 839 (1995) (noting "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); *Grumet*, 512 U.S. at 704 (noting "[t]he general principle that civil power must be exercised in a manner neutral to religion . . . is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals"); *Davis v. Page*, 385 F. Supp. 395, 402 (D.N.H. 1974) (noting "[t]he Establishment Clause does not demand hostility to religion, only neutrality"); Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1040-43 (2002); Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Towards a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 9-11 (2001); see also STRONKS, *supra* note 150, at 20 (noting that courts have used different definitions of neutrality defining neutrality as "treating foundational commitments equally" for Free Exercise cases and as "getting the religious out of the public sphere" for Establishment Clause cases). However some, including Rousas John Rushdoony, have argued that religious neutrality is impossible. GREG L. BAHNSEN, *BY THIS STANDARD* 291-92 (1985); FRITZ DETWILER, *STANDING ON THE PREMISES OF GOD: THE CHRISTIAN RIGHT'S FIGHT TO REDEFINE AMERICA'S PUBLIC SCHOOLS* 124 (New York University Press 1999); HERBERT W. TITUS, *GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES* 20-21 (1994) (contrasting the views of Rushdoony and Tribe). In addition, it has been argued that the neutrality was never intended by the adoption of the religion clauses. DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW* 71-73 (Crossway Books 1987).

¹⁵⁸ *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). The Court stated that:

Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree . . . our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause. There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Id. In some cases the Court will refer to all three tests in a single opinion, adding to the confusion. *E.g.*, *Santa Fe Indep. Sch. Dist. v. Roe*, 530 U.S. 290 (2000) (referring to all three Establishment Clauses). Some would argue that the tests are not significant to Supreme

Some legal scholars have criticized the Court's application and interpretation of the Establishment Clause.¹⁵⁹ Some have criticized the application of the Establishment Clause to the states through incorporation and argue that the current approaches to the Establishment Clause are based on a misconstruction of history.¹⁶⁰

Court decisions and are merely used by the justices to achieve the results they want. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 157 (2d ed. 1994).

Moreover, tests have little to do with decisions; the use of a test lends the appearance of objectivity to a judicial opinion, but no evidence shows that a test influences a member of the Court to reach a decision that he or she would not have reached without that test. And justices using the same test often arrive at contradictory results.

Id. at 156; see JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 174-75 (2000) (discussing the confusion as to what test is applied in Establishment Clause cases).

¹⁵⁹ See *infra* notes 160-61.

¹⁶⁰ See, e.g., DREIBACH, *supra* note 157, at 48 (discussing the view that the current interpretations of the Establishment Clause are based on a misconstruction of the history of the First Amendment). Some states continued to maintain established churches into the nineteenth century and some argue that the drafters of the Establishment Clause never intended for it to apply to the states. CHEMERINSKY, *supra* note 149, at 1237 (noting that the incorporation of the Establishment Clause was more controversial than the incorporation of the Free Exercise Clause); DREIBACH, *supra* note 157, at 77 (noting that "at the beginning of the War of Independence, officially established churches existed in nine of the thirteen colonies"); FRANKEL, *supra* note 36, at 26 (noting that some states continued to have established churches and many states "enforced Protestantism to some degree"); FRANCIS GRAHAM LEE, *CHURCH-STATE RELATIONS* 84-86 (Greenwood Press 2002); LEVY, *supra* note 158, at 147-48 (suggesting that the Establishment Clause was not intended to be applied to the states and noting that the framers of the First Amendment considered and rejected a constitutional amendment which would have allowed the Establishment Clause to be applied to the states); STEPHENS, *supra* note 155, at 532 (noting that some states maintained established churches for many years after the adoption of the Establishment Clause); MELVIN I. UROFSKY, *RELIGIOUS FREEDOM: RIGHTS AND LIBERTIES UNDER THE LAW* 61 (2002) (noting that "a number of states had continued to fund churches after the Revolution, had imposed test oaths, and had discriminated against Jews, Catholics, and atheists"); see also *Everson*, 330 U.S. at 8-16 (discussing the history of the Establishment Clause). See generally FORREST McDONALD, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 246-52 (1982) (discussing the erosion of federalism).

There is evidence that Jefferson never intended his "wall" metaphor to be applied to the states. DREIBACH, *supra* note 155, at 54 (stating "Jefferson's separationist interpretation of the First Amendment was applicable only at the federal level and did not affect church-state policies in the respective states"). "Strictly speaking, Jefferson's 'wall' was a metaphoric construction of the First Amendment, which governed relations between religion and the national government." *Id.* at 65 (emphasis in original). It appears that Jefferson would have placed state governments on the same side of the "wall" as the church and not the national government. *Id.* at 62-70. Jefferson even supported legislation, though never enacted, that would have authorized the governor of Virginia to appoint days for prayer and fasting. *Id.* at 58-59; see *id.* at 59-62 (discussing the views of Jefferson and his contemporaries on the inapplicability of the Establishment Clause to the states); see

Another criticism is that the approaches utilized by courts are hostile towards religion.¹⁶¹

One of the approaches used by the Supreme Court to determine if a law violates the Establishment Clause is the *Lemon Test*, which involves a

also *Barron v. Baltimore*, 32 U.S. 243, 250 (1833) (stating that there is "no expression indicating an intention to apply them to state governments"); DREISBACH, *supra* note 157, at 50 (stating "[o]n the contrary, the religion clauses enacted by the First Congress provided for a legal separation between church and state at the federal level and nor a moral or spiritual separation").

There are also arguments that the Court's mischaracterization of history does not reflect the way Americans perceived the religion clauses at the time they were adopted, for example:

Early Americans perceived no wall of separation between religion and the state, or even between the sphere of religious matters and that of secular concerns. In times of crisis and thanksgiving, the state not only could but should declare a day of prayer. This was part of the culture, and no one gave a second thought to it.

UROFSKY, *supra*, at 58 (2002); see also *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 400-01 (1985) (Rehnquist, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 92-107 (1985) (Rehnquist, J., dissenting); R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* 19-20 (1950) (stating that "to colonial Americans of the seventeenth century the term 'establishment of religion' meant two things . . . positive support of religion by public funds, and . . . legal enforcement of certain orthodox religious beliefs by . . . exclusive privileges of public worship [and] . . . punishment for those who tried to conduct other kinds of public worship"); M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS, AND THE AMERICAN TRADITION* 272-88 (1994) (discussing the historical context of the Establishment Clause and the religious views of some of the Framers); Harold Berman, *The Interaction of Law and Religion*, 31 *MERCER L. REV.* 405, 406-08 (stating that "[t]he authors of the Constitution, including those who were very skeptical of the truth of traditional theistic religion, did not doubt that the validity of the legal system itself depended of the validity of religious faith, and more particularly of the Protestant Christian faith"); Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 *EMORY L.J.* 223, 228-38 (2000) (discussing the use of history in analysis of the religion clauses and criticisms of the Court's use of history); William D. Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 *REGENT U. L. REV.* 513, 558-60 (2001).

¹⁶¹ E.g., DREISBACH, *supra* note 157, at 48 (discussing how some view the interpretations of the Establishment Clause by the Supreme Court as overshadowing the Free Exercise Clause). One group of critics of the Supreme Court's interpretation of the Establishment Clause are the "nonpreferentialists." *Id.* at 49. "Nonpreferentialists contend that the final phrasing of the religion clauses prove an intent to proscribe merely the establishment of a national church and to forbid government from preferring one religious sect or denomination above all others." *Id.* Some argue that the notion of an intent to create a secular state by the adoption of the religion clauses is a historical misinterpretation. *Id.* at 49-50. It is argued that the framers did not intend to prevent "governmental encouragement of religion" by the adoption of the religion clauses. *Id.* at 50-54; see also *id.* at 55-68 (discussing the first Congress' debates of the religion clauses).

three-prong analysis.¹⁶² The first prong of the test requires a secular purpose.¹⁶³ An impermissible religious purpose may be promotion of a particular belief or religion in general.¹⁶⁴ However, the Court typically gives great deference to the secular purpose advanced by the state, so long as it is sincere.¹⁶⁵ If a law does not meet the secular purpose requirement, the law fails under the *Lemon* Test and no inquiry into the second and third prongs is necessary.¹⁶⁶

The second prong looks at whether the primary effect of the law is either to advance or inhibit religion.¹⁶⁷ This prong is not violated by mere accommodation that allows private entities to advance religion.¹⁶⁸ The second prong is violated when actions of the government advance religion.¹⁶⁹

The third prong requires that there be no "excessive government entanglement."¹⁷⁰ This prong is difficult to define and apply.¹⁷¹ In addition, it is uncertain whether the Supreme Court still applies all three prongs of the *Lemon* Test.¹⁷² There is some indication that the third prong is now only a factor.¹⁷³ However, some lower courts continue to

¹⁶² See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁶³ *Id.*; *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

¹⁶⁴ *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). In *Edwards*, the Court invalidated a requirement that schools teaching the theory of evolution also provide instruction on the theory of creation under the secular purpose prong. *Id.* at 585-88; see also FRANCIS J. BECKWITH, LAW, DARWINISM, & PUBLIC EDUCATION 49-78 (Rowman & Littlefield 2003) (discussing the *Edwards v. Aguillard* decision and its impact on later cases).

¹⁶⁵ *Edwards*, 482 U.S. at 586-87; see, e.g., *Lemon*, 403 U.S. at 613 (finding a secular purpose of advancement of education); *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) (finding a Christmas display had the secular purpose of celebrating a national holiday).

¹⁶⁶ *Edwards*, 482 U.S. at 585.

¹⁶⁷ *Lemon*, 403 U.S. at 612; *Allen*, 392 U.S. at 243.

¹⁶⁸ *Corp. of Presiding Bishops v. Amos*, 483 U.S. 327, 337 (1987) (stating "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose").

¹⁶⁹ *Id.* at 337 (stating "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence").

¹⁷⁰ *Lemon*, 403 U.S. at 612 (quoting *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

¹⁷¹ LEVY, *supra* note 158, at 156 (noting that "excessive entanglement seems to carry the seeds of its own misconstruction. 'Excessive,' after all, is a relative term that cannot possibly have a fixed or objectively ascertainable meaning.>").

¹⁷² *Agostini v. Felton*, 521 U.S. 203, 205-06 (1997) (making the third prong, entanglement, just a factor).

¹⁷³ *Id.*

apply all three prongs of the *Lemon* Test.¹⁷⁴ The *Lemon* Test is still good law, but the Court has also indicated a willingness to utilize other approaches in analyzing Establishment Clause challenges.¹⁷⁵

Another approach used by the Supreme Court is the Endorsement Test.¹⁷⁶ The Endorsement Test first appeared in the concurring opinion by Justice O'Connor in *Lynch v. Donnelly*.¹⁷⁷ A majority of the Court first applied the test about five years later.¹⁷⁸ In applying the Endorsement Test, there are two considerations. The first is whether there was a subjective intent to communicate either endorsement or censure of religion.¹⁷⁹ The second consideration is whether a message of endorsement or censure was actually communicated.¹⁸⁰ A government action fails under the Endorsement Test if a reasonable person would see the state's action as approving or disapproving of religion.¹⁸¹ The Endorsement Test encourages governmental neutrality by preventing preference toward religion or elevating one religion over another.¹⁸²

¹⁷⁴ E.g., *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001); *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000); *Moore v. Metro. Sch. Dist.*, 2001 WL 243292 (S.D. Ind. Feb. 7, 2001); *Daugherty v. Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000); *In re Hodge*, 220 B.R. 386, 399-401 (D. Idaho 1998). But see, e.g., *Religion Found., Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001) (applying the *Lemon* test as modified by *Agostini*); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000) (applying the *Lemon* test as modified by *Agostini*).

¹⁷⁵ See *infra* notes 176-88. See generally Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 409-23 (criticizing the *Lemon* Test).

¹⁷⁶ *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); Feldman, *supra* note 156, at 694-706 (discussing the Endorsement Test); Elizabeth A. Harvey, Freiler v. Tangipahoa Parish Board of Education: Squeeze the *Lemon* Test Out of the Establishment Clause Jurisprudence, 10 GEO. MASON L. REV. 299, 306-07 (2001) (discussing the Endorsement Test).

¹⁷⁷ *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

¹⁷⁸ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁷⁹ *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

¹⁸⁰ *Id.* (O'Connor, J., concurring).

¹⁸¹ *Id.* at 688-90 (O'Connor, J., concurring).

¹⁸² *Allegheny*, 492 U.S. at 593; see *supra* note 157 and accompanying text.

The third approach proposed by some Supreme Court justices is the Coercion Test.¹⁸³ The Coercion Test appears in *Lee v. Weisman*.¹⁸⁴ Under the Coercion Test, the "government may not coerce anyone to support or participate in religion or its exercise."¹⁸⁵ The approach focuses on whether people are coerced into participating in religious activity contrary to their beliefs.¹⁸⁶ The coercion may come from public or peer pressure.¹⁸⁷ However, there is some indication that coercion is merely a factor to consider, and not a test.¹⁸⁸

Even if an Establishment Clause violation is found, that may not be the end of the analysis.¹⁸⁹ Situations involving religious exemptions cannot be analyzed under the Establishment Clause without also considering the Free Exercise Clause.¹⁹⁰ Some religious exemptions or preferences that could otherwise create an Establishment Clause problem due to lack of neutrality are permissible to avoid a violation of Free Exercise rights.¹⁹¹ Thus, Part II.B.2 discusses how the Free Exercise Clause, at times, creates a defense to an Establishment Clause violation.¹⁹²

¹⁸³ *Lee v. Weisman*, 505 U.S. 577, 586-99 (1992); see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 413-17 (2002) (discussing a historical basis for the Coercion Test and evaluating the advantages and disadvantages of a coercion approach to the Establishment Clause); Cheryl A. Hance, *Rosenberger v. Rector and Visitors of the University of Virginia: Will the Real Establishment Clause Test Please Stand Up?*, 5 WIDENER J. PUB. L. 549, 593-96 (1996) (criticizing the Coercion Test); Harvey, *supra* note 176, at 307 (discussing the Coercion Test).

¹⁸⁴ 505 U.S. at 586-99.

¹⁸⁵ *Id.* at 587.

¹⁸⁶ *Id.* at 593.

¹⁸⁷ *Id.* at 593-94.

¹⁸⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) ("to the extent we consider . . . coercive pressure"). Although some justices argue that *only* laws that coerce violate the Establishment Clause, it is not clear if a majority of the Court has accepted the Coercion Test. See generally *Weisman*, 505 U.S. 577 (including the Coercion test in the dissenting opinions and the Court's opinion, although the majority of the justices may actually be using the Endorsement Test); *County of Allegheny v. ACLU*, 492 U.S. 573, 659-62 (1989) (Kennedy, J., dissenting) (discussing coercion); Laura Gastel, *Is Good News No News for Establishment Clause Theory*, 52 DEPAUL L. REV. 125, 174 (2002) (discussing coercion as a factor in Establishment Clause analysis). But see *Zelman v. Simmons-Harris*, 536 U.S. 639, 656-57 (2002) (stating "[t]he Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools").

¹⁸⁹ See *supra* note 151 and accompanying text.

¹⁹⁰ See *infra* Parts II.B.2, III.

¹⁹¹ See *infra* notes 196-214 and accompanying text.

¹⁹² See *infra* Part II.B.2.

2. The Free Exercise Defense

Unlike the Establishment Clause, which addresses actions of government, the Free Exercise Clause more directly protects the individual's religious beliefs and practices.¹⁹³ Generally, the Establishment Clause has been interpreted to prohibit laws granting preferential treatment based on religion; however, in limited situations, exemptions to generally applicable laws are permitted to protect Free Exercise rights.¹⁹⁴ Accommodation of religion is permissible and sometimes required to an extent, but religious exemptions have only been permitted in a very limited number of cases.¹⁹⁵

Religious exemptions have been given for compulsory military service in the Armed Forces.¹⁹⁶ The exemption is for a "conscientious objection" to participating in war based on religious, but not political,

¹⁹³ CHEMERINSKY, *supra* note 149, at 1237.

¹⁹⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). The Court stated that:
[t]he Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.

Id. The Court had also stated that:

[t]he course of constitutional neutrality . . . cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); *see also King's Garden Inc. v. FCC*, 498 F.2d 51, 56 (D.C. Cir. 1974); *Davis v. Page*, 385 F. Supp. 395, 401-02 (D.N.H. 1974) (allowing a religious exemption for children from school activities when the activity is for entertainment and not education).

¹⁹⁵ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 (1987) (stating that accommodation may become "an unlawful fostering of religion"); *see infra* notes 196-230 and accompanying text.

¹⁹⁶ *Welsh v. United States*, 398 U.S. 333, 343-44 (1970); *United States v. Seeger*, 380 U.S. 163, 185-88 (1965).

sociological, or philosophical views.¹⁹⁷ However, in a concurring opinion, Justice Harlan indicated that the exemption should encompass more than just religious beliefs, stating that exemptions "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other . . . [s]uch distinctions are not . . . compatible with the Establishment Clause."¹⁹⁸

In *Walz v. Tax Commission*,¹⁹⁹ the United States Supreme Court allowed a property tax exemption for properties used for religious worship.²⁰⁰ In allowing the exemption, the Court emphasized the history of allowing religious exemptions from property taxes.²⁰¹ The Court also noted that the exemption was not only for religious organizations, and that not granting the exemption could result in additional government entanglement with religion.²⁰² The Supreme Court has also allowed a religious exemption from social security taxes for self-employed persons with religious objections to participating in the social security system.²⁰³

¹⁹⁷ *Seeger*, 380 U.S. at 164-66; see also LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 82-104 (2002) (providing a brief history of the conscientious objector exemption from military service in the United States).

¹⁹⁸ *Welsh*, 398 U.S. at 356 (Harlan, J., concurring).

¹⁹⁹ 397 U.S. 664 (1970).

²⁰⁰ *Id.* at 675-80; see also WITTE, *supra* note 158, at 185-215 (discussing religious property tax exemptions).

²⁰¹ *Walz*, 397 U.S. at 675-78.

²⁰² *Id.* at 672-75. The Court noted that the exemption extended to many non-profit activities of secular organizations. *Id.* The Court also emphasized the entanglement that would result in denying the exemption, stating that:

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result--the effect--is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes. Granting tax exemptions to churches . . . gives rise to some, but yet a lesser, involvement than taxing them . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Id. at 674-75.

²⁰³ *United States v. Lee*, 455 U.S. 252, 260-61 (1982).

This exemption, however, did not extend to exempt employers from paying their share of social security tax required for their employees.²⁰⁴

Another area where the Supreme Court has allowed exemptions is unemployment compensation.²⁰⁵ The religious exemptions prevent the denial of unemployment benefits for those who are unable to obtain or maintain employment due to their religion, such as refusing to work on the Sabbath.²⁰⁶ The Court has characterized the religious exemption decisions as requiring religious reasons for exemptions to be given the same weight as non-religious reasons.²⁰⁷ The Supreme Court has also allowed religious exemptions in employment to permit religious organizations to discriminate on the basis of religion in hiring and personnel decisions.²⁰⁸

The issue of religious exemptions has also been examined in the context of education.²⁰⁹ In *Wisconsin v. Yoder*,²¹⁰ the Supreme Court allowed an exemption from the state's generally applicable compulsory

²⁰⁴ *Id.* at 256.

²⁰⁵ *E.g.*, *Frazee v. Illinois Dept. Employment Sec.*, 489 U.S. 829, 834-35 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

²⁰⁶ *E.g.*, *Frazee*, 489 U.S. at 834-35; *Sherbert*, 374 U.S. at 410.

²⁰⁷ *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

²⁰⁸ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987); *see also King's Garden, Inc. v. FCC*, 498 F.2d 51, 60-61 (D.C. Cir. 1974) (allowing a similar exemption for religious discrimination in hiring, but not extending the exemption to positions having no connection with religious content or the religious message of the organization).

In addition, courts have allowed exemptions for moose meat at religious funeral ceremonies, jury duty, photographs on driver's licenses, municipal elections on religious holy days, obtaining social security numbers, beards for Jewish chaplains, and various prison regulations. *Quaring v. Peterson*, 728 F.2d 1121, 1127-28 (8th Cir. 1984) (allowing an exemption from getting a photograph taken for a driver's license); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (allowing a prisoner a dietary exemption for kosher food); *X v. Brierley*, 457 F. Supp. 350 (E.D. Pa. 1978) (allowing inmates to observe holy days); *Wright v. Raines*, 457 F. Supp. 1082 (D. Kan. 1978) (allowing an exemption for an inmate to grow a beard); *Michaelson ex rel. Lewis v. Booth*, 437 F. Supp. 439 (D.R.I. 1977) (preventing municipal elections on holy days); *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977) (allowing exemption from requiring parents to obtain social security numbers for their children); *Geller v. Sec'y of Def.*, 423 F. Supp. 16 (D.D.C. 1976); *Frank v. State*, 604 P.2d 1068, 1075 (Alaska 1979) (allowing an exemption for use of moose meat as a part of religious funeral ceremonies); *In re Jenison*, 125 N.W.2d 588 (Minn. 1963) (permitting an exemption from jury duty).

²⁰⁹ *See infra* notes 210-14, 221-27 and accompanying text.

²¹⁰ 406 U.S. 205 (1972).

school attendance law for Amish children.²¹¹ In allowing the exemption, the Court emphasized the threat to the religious community's way of life and continued survival.²¹² The Court also emphasized that even though the Amish children ages fourteen to fifteen would not attend school under the exemption, they would continue to receive education in conformity with the beliefs of the Amish community.²¹³ In applying *Yoder* to religious exemptions claimed by other groups in other contexts, courts have emphasized the limited scope of the holding.²¹⁴

However, in other situations, religious exemptions have not been permitted.²¹⁵ In some situations a religious exemption is denied even though the religious activity cannot lawfully occur without the exemption.²¹⁶ In *Reynolds v. United States*,²¹⁷ the Supreme Court held that the Free Exercise Clause did not require granting a religious exemption from a law prohibiting polygamy.²¹⁸ Likewise, the Court also denied an exemption for the religious use of peyote.²¹⁹ In rejecting the exemption

²¹¹ *Id.*; see also UROFSKY, *supra* note 160, at 151 (discussing the impact of *Yoder* on the home schooling movement and suggesting that this consequence of the decision was unanticipated).

²¹² *Yoder*, 406 U.S. at 217-19. The Court in *Yoder* stated that:
compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218.

²¹³ *Id.* at 224-26.

²¹⁴ See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995); *New Life Baptist Church Acad. v. East Longmeadow*, 885 F.2d 940, 950-51 (1st Cir. 1989); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (stating that the *Yoder* decision was based on "such a singular set of facts that we do not believe it can be held to announce a general rule"); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 56-57 (D.C. Cir. 1974) (stating "these isolated decisions create no precedent for the unlimited . . . exemption"); *Leebaert v. Harrington*, 193 F. Supp. 2d 491, 499 (D. Conn. 2002) (stating "the scope of any exception . . . must be limited to claims like the one in *Yoder*"); *Axson-Flynn v. Johnson*, 151 F. Supp. 2d 1326, 1340 (D. Utah 2001) (stating "*Yoder* itself involved a singular set of facts and the Court noted the highly individualized character of the hybrid right involved in that case"); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (stating "the holding in *Yoder* must be limited to its unique facts").

²¹⁵ See *infra* notes 217-27 and accompanying text.

²¹⁶ See *infra* notes 217-20.

²¹⁷ 98 U.S. 145 (1878).

²¹⁸ *Id.* at 165.

²¹⁹ *Employment Div. v. Smith*, 494 U.S. 872, 888-90 (1990). In *Smith*, the Court used *Yoder* to support the creation of hybrid Free Exercise claims. *Id.* at 881-82. Prior to *Smith*, neutral

for religious use of peyote the Court stated, "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."²²⁰

Although in *Yoder* a religious exemption was granted, lower courts have not granted religious exemptions in other situations involving education.²²¹ In *Swanson v. Guthrie Independent School District*,²²² the Tenth Circuit addressed the issue of religious exemptions for home schoolers.²²³ The home schooler in *Swanson* was seeking an exemption to

laws of general applicability could be challenged under the Free Exercise Clause if they burdened religion. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963). After *Smith*, Free Exercise challenges to religion-neutral laws no longer automatically received heightened scrutiny for burdening religion. *See, e.g.*, *Smith*, 494 U.S. 872. *But see* *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (finding a law was not neutral because it was aimed at the religious practice). *See generally* CATHERINE COOKSON, *REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE* 118-48 (2001) (discussing the *Smith* decision).

²²⁰ *Smith*, 494 U.S. at 878. In addition, the Court has denied religious exemptions in other areas. Although employment is one area where exemptions have been permitted, the Court denied an across the board, unqualified exemption from working on the Sabbath. *See Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1980). The Court found that the exemption advanced religion above any other interest. *Id.* at 710 (stating that "[t]he statute has a primary effect that impermissibly advances a particular religious practice"); *see also* CHEMERINSKY, *supra* note 149, at 1281. Chemerinsky suggests that the distinction between impermissible and permissible religious exemptions in employment:

is that the latter [the permissible exemptions] involved an exemption in a statute for religion, whereas the former [the impermissible exemption] concerned a law that provided a benefit solely for religion. The Court found that . . . the former was the government advancing religion through its own activities and influence. Yet, the distinction is difficult because both laws . . . granted a preference for religion alone.

Id. The Supreme Court also struck down an exemption from sales tax for religious periodicals and the creation of a special school district for a religious community. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 708-10 (1994) (prohibiting the creation of a special school district); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (striking down a sales tax exemption for religious periodicals).

²²¹ A religious exemption was not given to a college student who objected to speaking particular lines in a theater class. *Axson-Flynn v. Johnson*, 151 F. Supp. 2d 1326, 1339-41 (D. Utah 2001) (noting the deference courts have given to educators in determining curriculum requirements). High school students were denied a *Yoder*-like exemption from attending an AIDS awareness assembly. *Brown v. Hot, Sexy & Safer Prods. Inc.*, 68 F.3d 525, 538-39 (1st Cir. 1995). A seventh grader was denied an exemption from a mandatory health education course. *Leebaert v. Harrington*, 193 F. Supp. 2d 491, 501 (D. Conn. 2002). Also, elementary students were not granted an exemption for all uses of audio-visual equipment in the classroom, although a limited exemption for non-educational uses was permitted. *Davis v. Page*, 385 F. Supp. 395, 401-02 (D.N.H. 1974).

²²² 135 F.3d 694 (10th Cir. 1998).

²²³ *Id.*

allow part-time public school attendance.²²⁴ The United States Court of Appeals for the Tenth Circuit denied the exemption.²²⁵ The court held that to allow an exemption would impermissibly elevate religious home schoolers above secular home schoolers.²²⁶ In denying the exemption, the court noted that allowing the exemption would go beyond the requirements of Free Exercise and result in granting "special treatment" to religious home schoolers.²²⁷

²²⁴ *Id.* at 696-97.

²²⁵ *Id.* at 703.

²²⁶ *Id.* at 701 (stating that an exemption "would elevate [religious home schoolers] to a higher status than other home-schoolers who educate their children at home . . . for secular rather than religious reasons").

²²⁷ *Id.* at 702 (stating that the "Free Exercise Clause does not extend so far. It is designed to prevent the government from impermissibly burdening an individual's free exercise of religion, not to allow an individual to exact special treatment from the government . . . [n]othing in the Free Exercise Clause requires that such special treatment be provided"). It is also important to note that the home schooler in *Swanson* challenged the school policy prohibiting part-time attendance with a Free Exercise hybrid claim. *Id.* at 699-700. Free Exercise hybrid claims were created in *Employment Division v. Smith*, 494 U.S. 872 (1990). Prior to *Smith*, neutral laws of general applicability could be challenged under the Free Exercise Clause if they burdened religion. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963). After *Smith*, Free Exercise challenges to religion-neutral laws no longer automatically received strict scrutiny analysis. *E.g., Swanson*, 135 F.3d at 698. *But see* *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (holding that the law was not neutral because it was aimed at the religious practice). However, in *Smith*, the Court also recognized hybrid claims, joining another constitutional claim with Free Exercise, as a way to bring Free Exercise challenges to neutral and receive heightened scrutiny. *E.g., Swanson*, 135 F.3d at 699. In determining if a Free Exercise problem is created by the lack of a religious exemption, it is important to consider whether the Free Exercise claim could be brought as a hybrid claim and thus receive heightened scrutiny. *E.g., id.*

The Court in *Smith* used *Yoder* to support the creation of the hybrid claim. *Smith*, 494 U.S. at 881. *Yoder* involved claims of First Amendment Free Exercise of religion and Fourteenth Amendment interest of parents in guiding the upbringing of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). Likewise, homeschoolers bringing Free Exercise hybrid claims have linked Free Exercise with the parental interest in directing the education of their children. *E.g., Swanson*, 135 F.3d at 699-700; *Peterson v. Minidoka County Sch. Dist.*, 118 F.3d 1351, 1356-58 (9th Cir. 1997), *amended by* 132 F.3d 1258 (9th Cir. 1997); *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 931-34 (6th Cir. 1991); *Francis v. Barnes*, 69 F. Supp. 2d 801, 807 (E.D. Va. 1999); *Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471, 475-76 (D. Md. 1995). In addition, some home schoolers have brought claims using the Fourteenth Amendment parental interest without also bringing a Free Exercise claim. *E.g., Clonalara, Inc. v. Runkel*, 722 F. Supp. 1442 (E.D. Mich. 1989); *People v. Bennett*, 501 N.W.2d 106, 112-15 (Mich. 1993) (rejecting a challenge to Michigan's teacher certification requirement based on the parent's fundamental right to direct the education of their children). *See generally* Michael E. Chaplin, *Peterson v. Minidoka County School: Home Education, Free Exercise, and Parental Rights*, 75 NOTRE DAME L. REV. 663 (1999) (discussing a successful Free Exercise claim involving home education).

In looking at religious exemptions in the context of home schooling, it is important to note that, for the most part, home schoolers have been unsuccessful in challenging state laws under the Free Exercise Clause.²²⁸

In *Swanson*, the home schooler brought a hybrid challenge combining a Free Exercise claim with the parents' right to direct the education of their child. 35 F.3d at 699-700. The court, however, found that the home schooler failed to state a valid hybrid claim. *Id.* at 700. Although the *Swanson* court noted that parents have the right to direct their children's education, for example to choose to send their children to public or private school, the court held that the right did not extend to requiring that their child be permitted to attend public school part-time. *Id.* at 699-700.

However, a similar hybrid claim was successful in *People v. DeJonge*. 501 N.W.2d 127, 143-44 (Mich. 1993). In *DeJonge*, the Michigan Supreme Court found that the home schooler did bring a valid hybrid claim and held that the state's teacher certification requirement was unconstitutional when applied to religious home schoolers. *Id.* at 143-44. Although both involved similar Free Exercise hybrid claims, it may not be easy to reconcile the two cases. One difference may be the nature of the parental right. *Swanson*, 135 F.3d at 699-700; *DeJonge*, 501 N.W.2d at 134-35. Perhaps the *DeJonge* court found a parental right claim because the highly prohibitive nature of the teacher certification requirement made it extremely difficult for parents to choose to home school, where the *Swanson* court did not find a parental right claim because the parents were not prohibited from choosing home schooling or public schooling, only from choosing both. *Swanson*, 135 F.3d at 699 (stating "[w]e have no quarrel . . . that Annie's parents have a constitutional right to direct her education, up to a point. For example, they have a right to send her to private school, whether that school is religious or secular . . . [but not] to control each and every aspect of their children's education."); *DeJonge*, 501 N.W.2d at 137 (stating "this is not a case in which the DeJonges must forgo a government benefit or privilege in lieu of their religious beliefs, because the state compels through criminal sanction both mandatory education and the certification requirement"). However, the difference may not be simply the nature of the parental right. While the *DeJonge* court did find a valid parental right claim and applied heightened scrutiny based on the two claims, the *DeJonge* case appeared to rely more on Free Exercise than the parental right. *DeJonge*, 501 N.W.2d at 137 (stating "the state's enforcement of the teacher certification requirement compels the DeJonges to sin"). This becomes even more apparent in looking at the opinion in *People v. Bennett*. 501 N.W.2d 106 (Mich. 1993). *Bennett* was a decision by the same court and handed down on the same day as *DeJonge*. GORDON ET AL., *supra* note 38, at 38-40. In *Bennett*, the same teacher certification requirement was upheld when challenged as violating parents' rights to direct the education of their children alone, without the Free Exercise claim. *Bennett*, 501 N.W.2d at 120.

²²⁸ See, e.g., *Swanson*, 135 F.3d at 697-700; *Vandiver*, 925 F.2d at 931-34 (rejecting a post-Smith Free Exercise claim); *Murphy v. Arkansas*, 852 F.2d 1039, 1041-43 (8th Cir. 1988) (rejecting a pre-Smith Free Exercise claim challenging the Arkansas standardized testing requirement); *Duro v. North Carolina*, 712 F.2d 96, 97-99 (4th Cir. 1983) (rejecting a pre-Smith challenge to North Carolina's compulsory attendance law); *Francis*, 69 F. Supp. 2d at 807 (rejecting a post-Smith Free Exercise claim); *Battles*, 904 F. Supp. at 475-76 (rejecting a post-Smith Free exercise challenge to Maryland's compulsory education law and homeschooling requirements); *Null v. Bd. of Educ.*, 815 F. Supp. 937, 939-40 (S.D. W. Va. 1993) (rejecting a post-Smith Free Exercise challenge to a standardized testing requirement); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 128-35 (N.D.N.Y. 1988) (rejecting a pre-Smith Free Exercise challenge to New York's compulsory attendance law); *Jeffery v. O'Donnell*,

Although parents have a right to send their children to private or religious schools, and perhaps even to home school, the question is whether this right means they should be exempt from state regulation of education.²²⁹ In *Yoder*, an exemption from compulsory school attendance

702 F. Supp. 516, 518 (M.D. Pa. 1988) (rejecting a pre-Smith challenge to Pennsylvania's compulsory attendance law); *Jernigan v. State*, 412 So. 2d 1242, 1246 (Ala. Crim. App. 1982) (rejecting a pre-Smith Free Exercise challenge to the Alabama teacher certification requirement); *Burrow v. State*, 669 S.W.2d 441, 443-44 (Ark. 1984) (rejecting a pre-Smith Free Exercise claim); *State v. Bigelow*, 334 N.W.2d 444, 446-47 (Neb. 1983) (rejecting a pre-Smith Free Exercise claim); *State v. Anderson*, 427 N.W.2d 316, 322-25 (N.D. 1988) (rejecting a pre-Smith Free Exercise claim); *State v. Riddle*, 285 S.E.2d 359, 364-65 (W. Va. 1981) (rejecting a pre-Smith challenge). But see, e.g., *Peterson*, 118 F.3d at 1356-57 (involving a successful post-Smith Free Exercise challenge brought by a father reassigned from a principal to a teaching position due to his decision to home school his own children); *DeJonge*, 501 N.W.2d at 143-44 (involving a successful post-Smith Free Exercise challenge to Michigan's teacher certification requirement); *supra* note 227 (discussing the *Bennett* and *DeJonge* cases).

Home schoolers have also brought other constitutional challenges. Some have challenged state regulation of home schooling as unconstitutionally vague, violating the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty or property, without due process of law."). A state law is impermissibly vague if persons of common intelligence must guess to determine the meaning of the law. E.g., *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925). Home schoolers have successfully struck down state laws based on vagueness. E.g., *Jeffery*, 702 F. Supp. at 518-22 (finding Pennsylvania's compulsory attendance law unconstitutionally vague); *Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983); *State v. Trucke*, 410 N.W.2d 242 (Iowa 1987); *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985); *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983). But see, e.g., *Blackwelder*, 689 F. Supp. at 121-28 (finding that the homeschool requirements were not unconstitutionally vague as applied to the facts of the case); *Burrow*, 669 S.W.2d at 443 (rejecting a vagueness challenge). Home schoolers have also brought other due process claims. *Vandiver*, 925 F.2d at 934-35 (rejecting a due process claim); *Null*, 815 F. Supp. at 940 (rejecting a due process claim regarding a standardized testing requirement); *Blackwelder*, 689 F. Supp. at 135-37, 145-47 (rejecting a substantive due process claim and a biased decision maker due process claim); *Francis*, 69 F. Supp. 2d at 806-07 (rejecting a due process claim).

In addition, home schoolers have brought Equal Protection claims under the Fourteenth Amendment. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). However, courts have been unwilling to find that home schoolers are a suspect class or that the regulations impair a fundamental right. E.g., *Vandiver*, 925 F.2d at 930-31 (rejecting an Equal Protection claim); *Murphy*, 852 F.2d at 1043-44 (rejecting an Equal Protection challenge to Arkansas' standardized testing requirement); *Null*, 815 F. Supp. at 940; *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 460-62 (N.D. Ill. 1974).

There also have been Establishment Clause challenges to state laws brought by religious home schoolers. *Blackwelder*, 689 F. Supp. at 142-45 (rejecting an Establishment Clause claim); *State v. Anderson*, 427 N.W.2d 316, 320-22 (N.D. 1988) (rejecting an Establishment Clause challenge to a teacher certification requirement).

²²⁹ *Swanson*, 135 F.3d at 699-700. See generally *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

was granted to permit the continued existence of the Amish faith, but courts have been reluctant to extend this exemption to other educational situations.²³⁰

If a religious exemption is necessary to avoid a Free Exercise conflict, the exemption does not create an Establishment Clause violation.²³¹ In analyzing the constitutionality of Alabama, Virginia, and Wyoming religious exemptions, this Note first addresses whether the exemptions violate the Establishment Clause.²³² Next this Note analyzes whether the exemptions are permissible to prevent a violation of Free Exercise rights.²³³

III. ANALYSIS

As discussed in Parts I and II, fewer requirements are imposed on religious home schoolers in Alabama, Virginia, and Wyoming than on secular home schoolers.²³⁴ In Alabama, religious home schoolers may receive an exemption from the attendance, curriculum, annual notice, and teacher certification requirements by obtaining church sponsorship.²³⁵ Likewise, religious home schoolers in Virginia can obtain an exemption from the curriculum submission, annual notice, standardized testing, and attendance requirements.²³⁶ Religious home

²³⁰ See *supra* notes 210-14 and accompanying text.

²³¹ See *supra* notes 196-214 and accompanying text. However, as previously noted, in applying this exception to Establishment Clause violations, courts have emphasized the limited situations where this defense applies. See, e.g., *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995); *New Life Baptist Church Acad. v. East Longmeadow*, 885 F.2d 940, 950-51 (1st Cir. 1989); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (stating that the *Yoder* decision was based on "such a singular set of facts that we do not believe it can be held to announce a general rule"); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 56-57 (D.C. Cir. 1974) ("But these isolated decisions create no precedent for the unlimited 1972 exemption. In *Zorach* (citation omitted), the Court carefully confined its ruling to the facts of the case. In *Walz* (citation omitted), the Court stressed the peculiar historical role of property tax exemptions for places of worship."); *Leebaert v. Harrington*, 193 F. Supp. 2d 491, 499 (D. Conn. 2002) (stating, "the scope of any exception . . . must be limited to claims like the one in *Yoder*"); *Axson-Flynn v. Johnson*, 151 F. Supp. 2d 1326, 1340 (D. Utah 2001) (stating, "*Yoder* itself involved a singular set of facts and the Court noted the highly individualized character of the hybrid right involved in that case"); *Blackwelder*, 689 F. Supp. at 135 (stating, "the holding in *Yoder* must be limited to its unique facts").

²³² See *infra* Part III.A.

²³³ See *infra* Part III.B.

²³⁴ See *supra* Parts I, II.A.2.

²³⁵ See *supra* notes 125-32 and accompanying text.

²³⁶ See *supra* notes 133-37 and accompanying text.

schoolers in Wyoming may receive an exemption permitting them to exclude topics or concepts from the curriculum requirement under the home school statute.²³⁷ In addition, religious home schoolers in Wyoming have the option of home schooling as a church school exempting them from any form of state regulation if the home school is sponsored by a church or denomination.²³⁸ The Alabama, Virginia, and Wyoming exemptions for religious home schoolers raise questions of constitutionality under the Establishment Clause by creating systems of regulating home schooling that are not neutral towards religion.²³⁹ In all three states, a religion-neutral home school statute would resolve the First Amendment concerns.²⁴⁰

In analyzing whether the Alabama, Virginia, and Wyoming exemptions are unconstitutional, it is important to look at both religion clauses of the First Amendment.²⁴¹ In analyzing the constitutionality of the exemptions under the Establishment Clause, each of the three tests used by the Supreme Court is considered.²⁴² However, even if the exemptions do violate the Establishment Clause, it is still necessary to determine whether they are nonetheless constitutional to prevent a violation of Free Exercise rights.²⁴³

A. *The Establishment Clause Tests*

As previously discussed, it is unclear which Establishment Clause test would be applied to determine if the statutes are unconstitutional.²⁴⁴ While arguments can be made that the current Establishment Clause approaches adopted by the Supreme Court should not be applied, those approaches are the only tests currently being applied by courts in Establishment Clause cases.²⁴⁵ The various approaches espoused by Supreme Court Justices as appropriate in analyzing Establishment Clause violations are the *Lemon* Test, the Endorsement Test, and the Coercion Test.²⁴⁶ In some cases the *Lemon* Test, Endorsement Test, and Coercion Test have each been discussed without an indication of

²³⁷ See *supra* note 143 and accompanying text.

²³⁸ See *supra* note 142 and accompanying text.

²³⁹ See *infra* Part III.A.

²⁴⁰ See *infra* Parts IV-V.

²⁴¹ See *supra* Part II.B.

²⁴² See *supra* Part II.B.1.

²⁴³ See *infra* Part III.B.2.

²⁴⁴ See *supra* note 158 and accompanying text.

²⁴⁵ See *supra* notes 156-61 and accompanying text.

²⁴⁶ See *supra* notes 162-88 and accompanying text.

whether one is controlling.²⁴⁷ Therefore this Part analyzes the Alabama, Virginia, and Wyoming statutes under each of the three tests.²⁴⁸

1. The *Lemon* Test

The three-prong *Lemon* Test looks at whether the statute has a secular purpose, whether religion is advanced or inhibited by the primary effect, and whether the statute involves excessive government entanglement.²⁴⁹ It may be difficult to argue that any of the religious exemptions meet the first *Lemon* prong. The entire purpose of the exemptions appears to be to benefit religious home schoolers by reducing some or eliminating all of the requirements that would otherwise be imposed. Each state could argue that the secular purpose of the exemptions is to advance education.²⁵⁰ The problem is: how does imposing fewer requirements on home schoolers based solely on religion advance education? However, given the great deference courts have given to states in articulating a secular purpose, it is unclear if the exemptions would violate the first prong of the *Lemon* Test, but an argument can be made that there is no secular purpose for these exemptions.²⁵¹

The second prong of the *Lemon* Test presents greater difficulties for the Alabama, Virginia, and Wyoming exemptions, as a court would likely find that the exemptions have the primary effect of advancing religion.²⁵² The states could argue that the exemptions are merely accommodating religion by allowing the religious home schoolers, and not the state, to advance religion.²⁵³ The argument would be that the exemptions do not encourage religious activity, but merely alleviate some of the restrictions placed on the religious activity of home schoolers. This argument would be more compelling if, absent the

²⁴⁷ See *supra* note 158 and accompanying text.

²⁴⁸ See *infra* text accompanying notes 249-76.

²⁴⁹ See *supra* notes 162-75 and accompanying text.

²⁵⁰ See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1971) (noting "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education"); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (finding a secular purpose of advancement of education); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted").

²⁵¹ See *supra* note 165 and accompanying text.

²⁵² See *supra* notes 167-69 and accompanying text.

²⁵³ See *supra* Part II.A.2.

exemption, religious home schoolers were not permitted to advance their religion by educating their children at home.²⁵⁴ In all three states, religious home schoolers would be permitted to advance their religious beliefs through home schooling without the exemptions, although subject to the same requirements as secular home schoolers.²⁵⁵ In addition, the exemptions require religious beliefs or activities for the home schooler to receive the benefit of the less restrictive requirements.²⁵⁶ A court would likely find that the exemptions do not merely allow religious home schoolers to promote their beliefs, but instead reward the promotion of those religious beliefs with the benefit of fewer restrictions and give "special treatment" to religious homes schoolers.²⁵⁷ If the exemptions reward the promotion of religion, the statutes have the primary effect of promoting religion and thus fail under the second prong of the *Lemon* Test.

It is unclear if the third prong of entanglement is still applied as part of the *Lemon* Test, or if it is now merely a factor.²⁵⁸ Entanglement may present a problem for two of the exemptions, the Virginia statute and the Wyoming curriculum exemption.²⁵⁹ Entanglement may be a problem for the exemptions because the determination of whether a home schooler qualifies for the exemption is made by the state.²⁶⁰ Because religion must be the motivation for home schooling under the religious exemptions, the Virginia and Wyoming statutes may present a situation that requires courts to assess the sincerity of religious beliefs. Creating a system where the state is repeatedly assessing the sincerity of religious beliefs arguably creates additional government entanglement with religion.²⁶¹ In contrast, the Alabama and Wyoming exemptions allowing home schooling under church school statutes do not present as great a risk of entanglement. Rather than requesting an exemption from the states, home schoolers request sponsorship from their churches.²⁶² It is the church sponsorship, and not sincere religious beliefs, that the state

²⁵⁴ See *supra* Part II.A.2. However, the exemption may still be denied even if the activity could not occur lawfully without the exemption. See *supra* notes 216-20 and accompanying text.

²⁵⁵ See *supra* Part II.A.2.

²⁵⁶ See *supra* note 169.

²⁵⁷ See *supra* note 227.

²⁵⁸ See *supra* notes 172-74 and accompanying text.

²⁵⁹ See *supra* notes 133-37, 143-44 and accompanying text.

²⁶⁰ See, e.g., *Johnson v. Prince William County Sch. Bd.*, 404 S.E.2d 209 (Va. 1991).

²⁶¹ See *supra* note 202.

²⁶² See *supra* notes 132, 141 and accompanying text.

requires in determining if the exemption applies. Under the Alabama and Wyoming church school statutes, if a determination of the sincerity of religious beliefs is made, it is by the home schooler's church and not the state. Although the Alabama and Wyoming church school statutes do not create excessive entanglement, they may still violate the Establishment Clause under either prong one or prong two of the *Lemon* Test. Applying the *Lemon* Test, a court would likely find that the Alabama, Virginia, and Wyoming exemptions violate the Establishment Clause.

2. The Endorsement Test

Under the Endorsement Test, the court looks at whether the statute communicates endorsement or censure of religion and whether that message of endorsement or censure is actually communicated.²⁶³ A court applying the Endorsement Test would likely determine that the Alabama, Virginia, and Wyoming statutes violate the Establishment Clause. The statutes all allow religious parents to home school their children without subjecting them to the requirements imposed on secular home schoolers.²⁶⁴ By granting the benefit of fewer requirements to religious home schoolers based solely on their religious beliefs, the statutes appear to be communicating an endorsement of religion. As discussed with regard to prong two of the *Lemon* Test, a court would likely view these statutes as not merely allowing religious home schoolers to promote their beliefs, but instead rewarding the promotion of those beliefs by reducing the amount of regulation imposed by the state.²⁶⁵ Families such as the Smiths or the Does from Part I could see the exemption given to families like the Joneses as a communication of endorsement of religion.²⁶⁶ Without the exemptions, the Joneses would still be able to promote their religious beliefs through educating their children at home, but with the exemptions, the Joneses are able to receive the "special treatment" of less restrictive requirements than those imposed on the Smiths and the Does.²⁶⁷ By giving preferential treatment to religious home schoolers, the exemptions in Alabama, Virginia, and

²⁶³ See *supra* notes 176-82 and accompanying text.

²⁶⁴ See *supra* notes 221-27 and accompanying text.

²⁶⁵ See *supra* text accompanying notes 252-57.

²⁶⁶ See *supra* Part I.

²⁶⁷ However, given the highly prohibitive nature of teacher certification it could be argued that the Joneses would not be able to educate their children at home without the exemption. See *supra* notes 114-15 and accompanying text; *infra* text accompanying notes 272-73.

Wyoming do not promote the government neutrality towards religion that the Endorsement Test encourages.²⁶⁸

3. The Coercion Test

Although never officially adopted by a majority of the court, some Supreme Court justices would allow all forms of assistance to religion, provided there is no coercion.²⁶⁹ Unlike under the other two the Establishment Clause tests, the Virginia and Wyoming exemptions do not appear to violate the Establishment Clause by coercing participation in religious activity.²⁷⁰ The exemptions do not require participation in religious activity, but merely alleviate some of the requirements for home schooling. The exemptions do not appear to create any type of coercive pressure to engage in religious activity. However, the Alabama statute may not fare as well under the Coercion Test due to the teacher certification requirement imposed on all home schoolers not qualifying for the church school exemption.²⁷¹

Teacher certification is arguably the most restrictive form of regulation of home schooling.²⁷² Because teacher certification is such a difficult requirement to meet, secular home schoolers may feel coerced to join churches that sponsor home schoolers and participate in religious activity to enable them to home school their children without obtaining teacher certification. In addition, some religious home schoolers may be members of churches that do not encourage home education. Those home schoolers may also be coerced into joining a church that sponsors home schoolers to avoid the requirement.²⁷³ While the Wyoming church school exemption is also based on church sponsorship, it does not present the same risk of coercion as the Alabama church school exemption. It is unlikely that there is coercion as a result of the Wyoming statute because of the minimal requirements imposed without the exemption. Unlike the restrictive teacher certification requirement

²⁶⁸ See *supra* note 157.

²⁶⁹ See *supra* notes 183-88 and accompanying text.

²⁷⁰ See *supra* notes 133-44 and accompanying text.

²⁷¹ See *supra* notes 126-32 and accompanying text; *infra* text accompanying notes 272-73.

²⁷² See *supra* notes 113-21 and accompanying text.

²⁷³ Home School Legal Defense Association's website recommends that parents in Alabama seeking the exemption should regularly attend the church sponsoring their school and that the church should meet every week, include more than one family, and practice baptism and the Lord's supper. Home School Legal Defense Association, *Can a Homeschool Operate Under a Home Church?*, (July 17, 2001), at <http://www.hsllda.org/hs/state/al/200209170.asp>.

imposed by Alabama, secular home schoolers in Wyoming need only include the required subjects in their curriculum and provide annual notice that those subjects are being taught.²⁷⁴ Whether applied as a test or a factor, coercion may weigh heavily against the constitutionality of the Alabama exemption. However, if coercion is considered with regard to the Virginia and Wyoming exemptions, a court would likely find that they allow and perhaps encourage, but do not coerce, participation in religious activity.

Even if the Alabama, Virginia, and Wyoming exemptions violate the Establishment Clause, this does not end the analysis. The exemptions may yet survive a constitutional challenge if they are necessary to avoid a violation of Free Exercise rights.²⁷⁵ Part III.B analyzes whether the Alabama, Virginia, and Wyoming exemptions are necessary to prevent a Free Exercise problem.²⁷⁶

B. *The Free Exercise Defense*

In some situations a religious exemption is permitted to avoid a conflict with the Free Exercise Clause.²⁷⁷ Some point to the *Yoder* decision as support for the constitutional protection of home schooling.²⁷⁸ The argument can be made, based on *Yoder*, that the exemptions in the Alabama, Virginia, and Wyoming statutes are necessary to avoid the Free Exercise violation that would result from the removal of the exemptions. Under this argument, the parental rights related to the education of children, particularly the right to provide children with a religious education and religious beliefs related to the education of children, would be emphasized.²⁷⁹ As in *Yoder*, under the exemption, children will continue to receive education.²⁸⁰ Because the

²⁷⁴ In addition, those religious home schoolers who would not be able to obtain church sponsorship in Wyoming could still exclude concepts or topics from their curriculum under the other Wyoming religious exemption. See *supra* text accompanying notes 143-44.

²⁷⁵ See *supra* Part II.B.2.

²⁷⁶ See *infra* Part III.B.

²⁷⁷ See *supra* Part II.B.2.

²⁷⁸ UROFSKY, *supra* note 160, at 151 (stating that "[a]lthough home schooling is not limited to social and religious conservatives, they have been the backbone of the movement, and their publications have hailed the *Yoder* decision for giving their movement a constitutional imprimatur").

²⁷⁹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See generally JOHN W. WHITEHEAD, PARENTS' RIGHTS 94-101 (1985).

²⁸⁰ *Yoder*, 406 U.S. at 224-26.

children continue to receive education, the argument is that the exemptions provide the best balance between the state's interest in societal education and the parent's religious beliefs. Under the exemptions, the children continue to be educated, but their education does not conflict with the religious belief that parents have a duty to educate their children, that public education is destructive to religious beliefs, and that removing religion from education fails to teach children essential moral values.²⁸¹ However, given the narrow interpretation later courts have given *Yoder*, it is unlikely that such an argument would be successful.²⁸²

Setting aside Wyoming's curriculum exemption for a moment, it is unlikely that a court would find the other exemptions necessary to avoid violating Free Exercise rights. One problem is the limited scope of the defense often emphasized in cases addressing religious exemptions.²⁸³ Although *Yoder* may in some ways be similar, it has often been given a very narrow interpretation.²⁸⁴ In applying *Yoder*, courts have emphasized the uniqueness of the Amish culture and the serious threat to the continued existence of the Amish culture posed by the compulsory education statute.²⁸⁵ Without the exemptions, religious parents in Alabama, Virginia, and Wyoming would not be prohibited from home schooling, they would simply be subjected to the same requirements as secular home schoolers.²⁸⁶ In addition, it is unlikely that a court would find the removal of the exemptions would pose a serious threat to the continued existence of a religious group.²⁸⁷

A court would likely view these exemptions as more analogous to the exemption the Tenth Circuit addressed in *Swanson* than the *Yoder* exemption.²⁸⁸ The parents in *Swanson* were not prevented from home schooling their child, they were only prevented from obtaining an exemption to allow their child to attend public school part time.²⁸⁹ In *Swanson*, the court denied the exemption, finding that the exemption sought went beyond the requirements of the Free Exercise Clause and

²⁸¹ See *supra* notes 52-54 and accompanying text.

²⁸² See *supra* note 214 and accompanying text.

²⁸³ See *supra* notes 199-214 and accompanying text.

²⁸⁴ See *supra* note 214 and accompanying text.

²⁸⁵ See *supra* notes 212-13 and accompanying text.

²⁸⁶ See *supra* Part II.A.2.

²⁸⁷ See *supra* note 212 and accompanying text.

²⁸⁸ See *supra* notes 209-14, 221-27 and accompanying text.

²⁸⁹ See *supra* note 227.

sought to provide "special treatment" to religious home schoolers.²⁹⁰ Because the religious home schoolers in Alabama, Virginia, and Wyoming would not be prevented from home schooling without the exemptions, it is likely a court would find creating the exemptions to be more like "special treatment" than mere accommodation. Going back to the families in Part I, the Joneses would be able to home school in Alabama, Virginia, and Wyoming without the exemptions provided they meet the same requirements as the Smiths and Does.²⁹¹ With the exemptions, however, the Joneses are given the "special treatment" of fewer restrictions than the Smiths or the Does.

In addition, home schoolers challenging state regulation of home schooling under the Free Exercise Clause have been almost entirely unsuccessful.²⁹² The fact that most courts have not found requirements imposed on home schoolers to violate the Free Exercise Clause makes it unlikely that a court would find an exemption from a requirement for religious home schoolers to be necessary to avoid violating the Free Exercise Clause. Requirements similar to those that would be imposed on religious home schoolers in Virginia and Wyoming without the exemptions are imposed on religious home schoolers in other states and have not been found unconstitutional under the Free Exercise Clause.²⁹³ However, the Alabama exemption may provide a slightly different situation.

In Michigan, the state supreme court found the teacher certification requirement unconstitutional under the Free Exercise Clause when applied to religious home schoolers.²⁹⁴ The Free Exercise violation of the Michigan teacher certification requirement provides an argument that the Alabama exemption is necessary to avoid a Free Exercise conflict. If Alabama's teacher certification requirement violates the Free Exercise Clause when applied to religious home schoolers, the Free Exercise defense might save the Alabama exemption. The problem with this argument is that other states, including Alabama, have found that teacher certification requirements do not violate the Free Exercise Clause.²⁹⁵ The argument that Alabama's exemption is necessary to avoid

²⁹⁰ *E.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (denying the creation of a special school district for a religious group).

²⁹¹ *See supra* Part I.

²⁹² *See supra* note 228 and accompanying text.

²⁹³ *See supra* note 228.

²⁹⁴ *See supra* note 227 (discussing *DeJonge*).

²⁹⁵ *See supra* note 121.

a Free Exercise conflict may be weakened because only one state has found that teacher certification requirements violate the Free Exercise Clause, and because Alabama has previously upheld the teacher certification requirement when challenged by a Free Exercise claim.

In addition, the Alabama exemption may present another constitutional problem. When religious beliefs are protected and sincerely held, they are protected even if not in conformity with the traditional tenets of a person's religion.²⁹⁶ This may also present a problem for the Wyoming church school exemption.²⁹⁷ Even if the exemptions are necessary to avoid violating the Free Exercise Clause, the church sponsorship requirements may create a problem by favoring organized religion. By requiring religious home schoolers to be sponsored by their church arguably requires that the religious belief that compels them to educate their children at home be in conformity with the beliefs of their church. Even if imposing the requirement on religious home schoolers would violate the Free Exercise Clause, by protecting only religious beliefs in conformity with one's church, the Alabama and Wyoming church school exemptions would not necessarily prevent a violation of the Free Exercise Clause.

There may also be an additional argument that the Free Exercise Clause should save the Wyoming curriculum exemption.²⁹⁸ This is due primarily to the narrowness of the exemption. The Wyoming curriculum exemption does not exempt religious home schoolers from all requirements, only from providing instruction on topics or concepts contrary to their religious beliefs.²⁹⁹ Returning to the Jones family from Part I, if home schooling in Wyoming, they are not required to provide instruction to their children on the theory of evolution if the theory of evolution is contrary to their religious beliefs.³⁰⁰ However, the Jones family may still be required to provide instruction in science with regard to other concepts and topics not conflicting with their religious beliefs. The narrowness of this exemption makes it similar to other exemptions permitted to avoid Free Exercise conflicts.³⁰¹

²⁹⁶ See *supra* note 148.

²⁹⁷ See *supra* notes 141-42 and accompanying text.

²⁹⁸ See *supra* notes 143-44 and accompanying text.

²⁹⁹ WYO. STAT. ANN. § 21-4-101(a)(vi) (Michie 2001).

³⁰⁰ See *supra* Part I.

³⁰¹ *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60-61 (1974) (allowing a similar exemption for religious discrimination in hiring, but not extending the exemption to positions having no

However, there is a Maryland case indicating that such an exemption might not be permitted.³⁰² In addition, the narrowness of the exemption does not resolve the potential lack of a Free Exercise conflict.³⁰³ Because it is unlikely that a court would find imposing the curriculum requirement on religious home schoolers to violate the Free Exercise Clause, arguably the Free Exercise Clause should not save the exemption.³⁰⁴ Due to the narrowness of the exemption and the potential lack of a Free Exercise conflict, it is difficult to determine if the Wyoming curriculum exemption is constitutional or not. Whether or not the exemption is constitutional, it is important to note that any possible Establishment Clause or Free Exercise Clause problems could be avoided by a curriculum requirement that suggests, rather than requires, that specific subjects be taught.³⁰⁵

The Alabama, Virginia, and Wyoming statutes may be unconstitutional under at least two of the Establishment Clause tests. The exemptions do not appear to create mere "benevolent neutrality" that allows religious exercise, but instead create restrictions on home schooling that favor religion.³⁰⁶ Although stronger arguments can be made for the Alabama exemption and the Wyoming curriculum exemption, it is uncertain whether any of the exemptions would be saved by the Free Exercise Clause.³⁰⁷ A religion-neutral home school statute that does not impose burdensome requirements, however, could create "benevolent neutrality" by allowing home schooling subject to restrictions that neither favor religious home schoolers nor infringe on their Free Exercise rights.³⁰⁸ In addition, a religion-neutral home school

connection with religious content or the religious message of the organization); *Davis v. Page*, 385 F. Supp. 395, 401-02 (D. N.H. 1974) (denying a broad exemption for all use of audio visual equipment, but allowing an exemption for non-educational uses); *People v. Dejonge*, 501 N.W.2d 127, 143-44 (Mich. 1993) (religious home schoolers not exempt from all regulation, just teacher certification).

³⁰² *Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471, 477 (D. Md. 1995). In *Battles*, the court indicated that "Maryland is not required to 'subsidize' Battles' particular religious beliefs by eliminating contrary viewpoints from the required curriculum . . . [i]ndeed, Maryland is prohibited from doing so by the Establishment Clause of the First Amendment." *Id.*

³⁰³ See *supra* note 228 and accompanying text.

³⁰⁴ See *supra* note 228 and accompanying text; see also text accompanying notes 88-91.

³⁰⁵ See *infra* text accompanying note 319.

³⁰⁶ *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (allowing room in the religion clauses for "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

³⁰⁷ See *supra* Part II.B.2.

³⁰⁸ See *infra* Part IV.

statute may reduce the complexity created by religious exemptions.³⁰⁹ By applying minimal requirements in a religion-neutral manner, a state may further its goal of advancing education without incurring the risk of violating the religion clauses of the First Amendment created by the religious exemptions.

IV. PROPOSED MODEL HOME SCHOOL STATUTE

As previously discussed, allowing religious home schoolers to be exempt from requirements imposed on secular home schoolers may violate the Establishment Clause.³¹⁰ While the Free Exercise Clause has been interpreted to allow religious exemptions in some situations that would otherwise violate the Establishment Clause, it is unclear whether the Free Exercise Clause would permit the types of religious exemptions found in the Alabama, Virginia, and Wyoming statutes.³¹¹ However, this is not to say that home schooling requirements never burden the religious beliefs of home schoolers.³¹² Although the vast majority of Free Exercise challenges to home schooling requirements have been unsuccessful, the courts that addressed the issue often recognized that the religion-neutral requirements burdened the beliefs of the home schoolers, but the challenges failed because the courts found that the state's interest in educating justified the incidental burden on religious beliefs.³¹³

Presumably the Alabama, Virginia, and Wyoming exemptions were adopted to relieve the burden home schooling regulations impose on religious home schoolers. However, Alabama, Virginia, and Wyoming could have achieved the same result without creating the potential constitutional problems by relieving all home schoolers, religious and secular, of the burden imposed by the additional requirements. It seems unlikely that it is necessary for the state to impose additional requirements on secular home schoolers to further the education of its citizens, particularly given that a large percentage of home schoolers are religious.³¹⁴ Perhaps even the argument can be made that given the academic success of home schoolers, a state may actually be further

³⁰⁹ *C.f.* Home School Legal Defense Association, *Certified to Teach, Licensed to Confuse* (Sept. 18, 2003), at <http://www.hslda.org/hs/state/va/200309181.asp>.

³¹⁰ *See supra* Part III.A.

³¹¹ *See supra* Part III.B.

³¹² *See supra* notes 52-54, 278-81 and accompanying text.

³¹³ *See supra* note 228 and accompanying text.

³¹⁴ *See supra* note 51 and accompanying text.

promoting the education of its citizens by reducing home schooling requirements and thereby potentially making home education a more viable option for a greater number of families.³¹⁵ This Note proposes that a religion-neutral home school statute imposing minimal requirements would effectively balance interests of religious home schoolers in exercising their beliefs with the state's interest in educating citizens, while at the same time avoiding the possible constitutional problems created by religious exemptions.

Proposed Home-Based Educational Program Statute

Section 1: Parental rights in general

*Parents have the natural and fundamental right to guide the upbringing of their children. This right includes the choice of educational program for children in the parent's charge. There shall be a rebuttable presumption that parents act in the best interests of children in their charge when making decisions regarding education. Home-based educational programs are recognized as a legitimate alternative to the compulsory school attendance requirement [insert state code section].*³¹⁶

Commentary:

Section one is designed to reinforce and define the rights of parents in making decisions with regard to their children's education. This section aims to reinforce and strengthen the rights of parents with regard to making decisions affecting the education of their children. It is also designed to establish the validity of home-based educational programs as exceptions to compulsory attendance requirements.

Section 2: Definitions

As used in this statute:

(A) "Home-based educational program" is defined as a program of education primarily conducted by parents for the children in their charge.

³¹⁵ See *supra* notes 60-66, 68-69 and accompanying text. See generally Page, *supra* note 59.

³¹⁶ See KLIKA, *supra* note 37, at 179-90. The Supreme Court has recognized that parents have a right to direct the education of their children. E.g., *Wisconsin v. Yoder*, 406 U.S. 206 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, some believe that lower court interpretations of this right have placed it in jeopardy and advocate reinforcing these rights by incorporating them into statutes. KLIKA, *supra* note 37, at 179-90. See generally WHITEHEAD, *supra* note 279, at 94-101; Davidson, *supra* note 156, at 443-46 (discussing parental rights).

(B) "Parent" is defined for the purpose of this statute as a parent or legal guardian of a child subject to the compulsory school attendance requirements of [insert state code section].

Commentary:

Section two is designed to provide definitions of terms used in the statute. The term "parent" is defined broadly to enable persons other than the children's biological parents, for example foster parents, to elect to educate them in a home-based educational program.

Section 3: Requirements

(A) Notice:

*A parent providing a home-based educational program must submit a one-time notice of intent to his or her local school superintendent. Notice must also be submitted to the local school superintendent if a home-based educational program is discontinued and the student is still subject to the compulsory education requirements of [insert state code section].*³¹⁷

(B) Curriculum:

*A home-based educational program must provide a basic academic program. A basic academic program may, but is not required to, include instruction in science, mathematics, history, government, writing, reading, grammar, health, geography, and physical education.*³¹⁸

(C) Attendance:

*Students in a home-based educational program shall be required to complete a period of instruction substantially equivalent in duration to that of public school students of the same age or grade level.*³¹⁹

(D) Disqualification for residence of a registered sex offender:

*A home-based educational program may not be operated in the residence of a person required to register as a sex offender under [insert state code section].*³²⁰

Commentary:

³¹⁷ See *supra* note 83.

³¹⁸ See *supra* notes 88-91 and accompanying text.

³¹⁹ See *supra* notes 92-94 and accompanying text.

³²⁰ See ARK. CODE ANN. § 6-15-508 (Michie Supp. 2001).

Section three provides the requirements for providing a home-based educational program. Subsection A requires that parents notify the local school superintendent to inform the state that the child is in an educational program and not violating the state's compulsory attendance law. Subsection B requires that a basic academic program be provided to assure that children in home-based educational programs are receiving adequate instruction. Because parents are presumed to be acting in the best interests of their child, it is also presumed that parents will provide an academic program designed to meet the educational needs of their student, absent evidence to the contrary. Subsection C provides the required duration of instruction. The requirement is not intended to require a specific number of days or hours of instruction, but instead to allow parents to create their own schedule for their home-based educational program while at the same time assuring that students receive adequate instruction. The final requirement, subsection D, is designed to avoid the use of home-based educational programs to prevent the discovery of sexual abuse of a child.

The model statute avoids the potential First Amendment problems of the Virginia, Alabama, and Wyoming statutes.³²¹ The statute does not contain any exemptions from requirements based on religion, thereby preventing an Establishment Clause problem.³²² In addition, the minimal requirements in the statute are unlikely to infringe on the Free Exercise rights of religious home schoolers because they do not impose a heavy burden on the exercise of religious beliefs.

The statute includes notice, curriculum, and attendance requirements. In addition, a home-based education program may not be located in the residence of a registered sex offender. The first requirement is that parents provide notice.³²³ This furthers the state's interest in education by informing the state that the child is enrolled in an educational program. The requirement is only a one-time, and not an annual, notice requirement. Annual notice requires more of parents, and because the notice is also required when a home-based educational program is discontinued while the student is still subject to compulsory attendance requirements, there seems little need for annual notice. Notice of discontinuance of the program is only required when a student is still subject to compulsory attendance requirements to avoid requiring parents to provide notice when students have graduated or are no longer of an age requiring school attendance.

³²¹ See *supra* Part III.

³²² See *supra* Part III.A.

³²³ See *supra* text accompanying note 317.

The second requirement is that a basic academic program be provided.³²⁴ Suggesting, but not requiring, that specific subjects be included in the home-based educational program gives parents discretion in tailoring an academic program to meet the educational needs and goals of their children. It is presumed that parents, acting in the best interests of their children, will provide an academic program designed to meet the educational needs of their children, absent evidence to the contrary.³²⁵ In addition, it avoids any concern that Free Exercise rights will be infringed by requiring topics or concepts that conflict with religious beliefs. Unlike the Wyoming curriculum exemption, this requirement is neutral toward religion.³²⁶ Neither religious nor secular home-based educational programs are required to include topics or concepts in its program that the parents object to including.

The third requirement is that home-based educational programs provide instruction an equivalent number of days or hours to the amount of instruction provided in public schools.³²⁷ The requirement does not require that the instruction be provided during specific times of the day or year.³²⁸ Requiring that instruction occur during specific times of the day or year does not do any more to further the state's interest than a less specific attendance requirement, and may create a greater inconvenience for home schoolers. Some home schoolers view flexibility as an advantage of home schooling.³²⁹ Home schoolers may want to adjust their schedule to allow time off at different times of the year than public schools, such as for the birth of a child or a family vacation. Other home schoolers may want to provide instruction at different times of the day, for example to allow a working parent to participate in instruction.

The fourth requirement is that a home-based educational program not be located in the residence of a registered sex offender.³³⁰ This provision is similar to an Arkansas statute³³¹ and is designed to avoid the use of a home-based education program to prevent the discovery of sexual abuse of a minor.

³²⁴ See *supra* text accompanying note 318.

³²⁵ See *supra* text accompanying note 316.

³²⁶ See WYO. STAT. ANN. § 21-4-101(a)(vi) (Michie 2003).

³²⁷ See *supra* text accompanying note 319.

³²⁸ See *supra* notes 92-94 and accompanying text.

³²⁹ WHITEHEAD & CROW, *supra* note 37, at 132-33.

³³⁰ See *supra* text accompanying note 320.

³³¹ ARK. CODE ANN. § 6-15-508 (Michie Supp. 2003).

However, not every type of requirement has been included in the model statute.³³² This model statute does not require standardized testing, record keeping, parental education levels, or teacher certification. Standardized testing requirements present several problems.³³³ When standardized testing requirements are accompanied by a minimum score requirement, there may be problems for home schooled students with special needs. For some students, such as those with learning disabilities, it may be difficult to achieve the minimum required score even when a more than adequate educational program is provided. Although allowing alternate means of evaluation may mitigate this effect, there may be other problems with standardized testing requirements.³³⁴ Some have criticized standardized testing as being a poor indicator of academic performance, and standardized testing may raise other constitutionality issues.³³⁵ While standardized tests may be a tool home schooling parents use to evaluate their children and to create a record of academic progress, for the aforementioned reasons this proposal does not contain a standardized testing requirement.

A record keeping requirement is also absent from this model statute.³³⁶ Record keeping requirements, particularly those requiring the submission of detailed assignments, can be burdensome and time consuming for home schoolers. In addition, it is difficult to imagine how requiring the submission of detailed assignments furthers the state's interest in education. In fact, the majority of states do not require any form of record keeping.³³⁷ While it may be prudent for parents providing a home-based educational program to keep records of student academic progress to present as evidence that a basic academic program has been provided in the event that a charge is brought of violation of the compulsory attendance statute, this statute does not require any record keeping.

In addition, the model statute does not include a parental education requirement.³³⁸ Lack of a baccalaureate degree has not been shown to have a significant negative effect on home schooled students, at least

³³² See *supra* Part II.A.1; see also *supra* text accompanying notes 317-20.

³³³ See *supra* notes 95-99.

³³⁴ See *supra* notes 98-99 and accompanying text.

³³⁵ See *supra* notes 98-99 and accompanying text.

³³⁶ See *supra* text accompanying notes 100-04.

³³⁷ Only twenty states and D.C. have record keeping requirements. See *supra* text accompanying notes 100-04.

³³⁸ See *supra* text accompanying notes 105-12.

with regard to standardized test scores.³³⁹ Even parental lack of a high school diploma or equivalent appears to have less of a negative effect on standardized test scores of home schooled students than public school students.³⁴⁰ Also, the majority of states do not have parental education requirements, implying that many states may not view the requirement as necessary to further the goal of advancing education.³⁴¹

Teacher certification is also absent from the list of requirements.³⁴² As previously discussed, very few states have teacher certification requirements for home schoolers, and the few that have them generally use them as one of several options for meeting a requirement.³⁴³ Teacher certification is seen as one of the most restrictive types of home schooling regulations, and some states do not even require teacher certification for teachers in public schools.³⁴⁴ In addition, there is evidence that suggests teacher certification has little to no effect on student academic performance.³⁴⁵ Thus, teacher certification is not one of the requirements included in this model statute.

Under the model statute, the families from Part I would all have to meet the same requirements to home school their children.³⁴⁶ The Joneses, the Smiths, and the Does would all have to provide notice of their intent to home school, a basic academic program, and instruction for a period of time substantially equivalent to public schools.³⁴⁷ The model statute would remove the "special treatment" the Joneses could receive under the Alabama, Virginia, and Wyoming religious exemptions.³⁴⁸

V. CONCLUSION

Although arguments can be made regarding the interpretation of the Establishment Clause and its applicability to states, given the current interpretations of the clause, the Virginia, Alabama, and Wyoming

³³⁹ See *supra* note 109 and accompanying text. But see *supra* notes 98-99 and accompanying text.

³⁴⁰ See *supra* note 110 and accompanying text.

³⁴¹ See *supra* text accompanying notes 105-12.

³⁴² See *supra* notes 113-21 and accompanying text.

³⁴³ See *supra* note 119 and accompanying text.

³⁴⁴ See *People v. DeJonge*, 501 N.W.2d 127, 142-43 (Mich. 1993).

³⁴⁵ See *id.* at 141; BASHAM, *supra* note 39, at 11.

³⁴⁶ See *supra* Part I.

³⁴⁷ See *supra* text accompanying notes 316-20.

³⁴⁸ See *supra* Part I.

exemptions would likely be found unconstitutional under at least two of the Establishment Clause approaches used by the Supreme Court.³⁴⁹ It is also unclear whether the exemptions would fall under one of the limited *Yoder*-like exceptions, permitting a religious exemption to prevent a Free Exercise problem.³⁵⁰ However, a religion-neutral home school statute would avoid these First Amendment issues. By allowing home schooling under a religion-neutral home schooling statute, states can avoid potential Establishment Clause problems by imposing the same requirements on both secular and religious home schoolers. At the same time, states can accommodate religion by allowing those who wish to home school for religious reasons to do so without imposing burdensome restrictions. Imposing the minimal requirements in the model statute, the state can promote the education of its citizens effectively and reduce the risk of violating the First Amendment.

Laura J. Bach*

³⁴⁹ See *supra* Part III.A.

³⁵⁰ See *supra* Part III.B.

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