CONSTITUTIONALISM AND THE RULE OF LAW: NEW HAMPSHIRE'S HOME SCHOOLING QUANDRY

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INTRODUCTION

New Hampshire's compulsory attendance statute[1] is the sternest school law in the country. It leaves parents with only two approved options: attendance at either a public or a private school. The New Hampshire Supreme Court's interpretation of the "private school" definition adds a further restraint on choice by demanding an institution or group aspect to private schools. Parents wishing to educate their children outside of an institutional format are left with little or no choice in New Hampshire. The institutional view of "school" was suggested by the New Hampshire Supreme Court as recently as 1974[2] and was echoed in the latest leading treatise on compulsory attendance laws.[3] Unconventional teaching environments, such as home education, have been consistently disfavored by the law in New Hampshire.[4]

Two years ago, however, without any statutory amendments, the New Hampshire State Board of Education adopted home schooling regulations[5] that are among the most permissive in the country: parents are not even required to hold a teaching certificate.[6] An emphasis on institutional formats for schooling finds no place in the regulations. In the most recent New Hampshire Su-

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1. N.H. REV. STAT. ANN. § 193:1 (1978).

2. *In re* Davis, 114 N.H. 242, 318 A.2d 151 (1974) (although not directly ruling on this issue, the court stated that a home tutor would not fulfill the public or private schooling requirement).

3. L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY ATTENDANCE (1980).

4. *Id.* at 158: "New Hampshire appears to be the only jurisdiction which has considered it reasonable to omit the home instruction alternative on the grounds of the possibly burdensome expense of state supervision of such programs."

5. Regulations and Procedures Pertaining to Home Education Programs in New Hampshire (June 1980.) Mr. Charles Marston of the New Hampshire home study program informed the author in a telephone interview on January 19, 1983, that these regulations expired July 1982 and that revisions should be officially adopted early in 1983. Until the new regulations are officially adopted, the June 1980 regulations continue to be in effect. (hereinafter referred to as Regulations).

6. *Id.* at Part I, § 4.

preme Court case[7] dealing with home schooling, the court did not consider a direct challenge to the state education board's authority to adopt this revolutionary new set of home schooling regulations. Given the statute's plain language and the court's decision in *Davis*,[8] this decision should arouse the concerns of all those who espouse a commitment to the rule of law. This flagrant contradiction should not go unnoticed.

This article considers the status of home schooling in New Hampshire and the legality of the New Hampshire State Board of Education's home schooling regulations in the context of the recent New Hampshire Supreme Court decision in *Appeal of Peirce*. In addition, the federal constitutional constraints on state regulation of education will be discussed. Some contrast will be provided by briefly commenting upon the spectrum of positions taken on home schooling in other states. Finally, a recommendation to the New Hampshire Legislature will be suggested.

I. The New Hampshire Schooling Law

A. *New Hampshire Case Law*

In *Appeal of Peirce*, the plaintiffs, parents of a school aged child, wished to educate their son at home. The essence of the appeal was that the State School Board of Education had failed to accord the plaintiffs procedural due process. Furthermore, the parents alleged that the Board was incorrect when it decided that the parents had failed to demonstrate a "manifest educational hardship."[9] The legal power of the Board to adopt its home schooling policy was not challenged.

The court construed the State Board of Education's "Regulations and Procedures Pertaining to Home Education Programs in New Hampshire."[10] The regulations required proof of "manifest educational hardship"[11] as a threshold element in approval of a home education plan. "Manifest educational hardship" arising

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7. Appeal of Peirce, 122 N.H. 762, 451 A.2d 363 (1982).
8. 114 N.H. 242, 318 A.2d 151 (1974).
9. 122 N.H. 762, 764, 451 A.2d 363, 364 (1982).
10. Regulations, *supra* note 5.
11. *Id.*:

> 2. "*Manifest Educational Hardship.* Manifest educational hardship may be considered to exist when ONE OR MORE INDICATORS ARE PRESENT FROM EITHER of the following categories: 2:1 *Assignment and Attendance* . . . [and] 2:2 *Educational Benefit* . . ." (emphasis in original).

from compliance with the compulsory attendance statute[12] will be assumed to exist where an applicant can demonstrate that a child will derive "special benefit" from a "quality home education program."[13] Under the Board's regulations, "when one or more [quality] indicators are present," that is evidence that the home education plan is capable of conferring a "special benefit."[14] There are nine such quality indicators in the regulations. The presence of any one of the nine quality indicators will allow the local school board to approve a home study plan.[15]

The Board's regulations, in effect, allow home schooling if it offers a "better" or "equivalent" education than the state schooling system. If it is "better," deprivation of the benefit that home schooling would confer would work a "manifest educational hard-

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12. N.H. REV. STAT. ANN. § 193:1 (1978).
13. Regulations, *supra* note 5, Part II, § 2.2:
    2.2 *Educational benefit.* The second category applies to those cases where an objective showing can be made by the parent that there are special benefits to be derived by the child from a *quality home education program* and that to deny the child an opportunity to receive such benefits would constitute an educational hardship. In demonstrating the special benefits to be derived by the child in the proposed home education program, one or more of the following quality indicators may be considered:
    2.2.1 the scope of the subject matter is particularly well focused and organized and congruent with the parent's written educational philosophy and stated learning objectives for the particular child;
    2.2.2 the specific competencies . . . of the parent(s) qualify him/her to provide the individual child with special educational benefits . . .;
    2.2.3 the educational plan provides the particular child with special opportunities for learning through interaction with both peers and adults;
    2.2.4 the educational plan demonstrates the effective use . . . of community resources . . .;
    2.2.5 the educational plan provides the individual child with planned and well-organized opportunities for applying the knowledge and skills learned at home to practical, real-life situations;
    2.2.6 the educational plan makes special provisions for . . . the individual child's creative abilities and talents;
    2.2.7 the educational plan [provides for] teaching methods appropriate to the age and developmental characteristics of the child;
    2.2.8 the educational plan provides for a substantial percentage of total instructional time on a single student basis to enable maximum teacher/pupil contact and participation by the individual child;
    2.2.9 the educational plan is reasonably considered the equivalent of those courses and learning experiences commonly taught in the public schools . . . . The term "equivalent" as used in this section shall mean the same in value, effect, importance of worth, but not necessarily in the same form as in the public school. (emphasis in original)
14. *Id.*, Part II at § 2.2.
15. *Id.* at § 2.

ship." The logic, the language, and the policy are unsettlingly complicated. Home schooling is considered a privilege of which parents *might* be able to avail themselves if they can prove that their schooling is superior, or at least equivalent, to that of the state. The standard of the regulations is said to be "objective" insofar as it requires no more than the application of predetermined "quality indicators."[16] According to the *Peirce* court, "[t]hese indicators included criteria such as the competency of the parents, the scope of the subject matter to be studied at home, the child's potential for interaction with peers and adults, and the teaching methods to be employed."[17] None of these criteria is capable of objective, mechanical evaluation; each criterion invites subjective evaluations. The decision must of necessity encompass such diverse elements as the institution in which it is to take place, the school, the family, etc. and the role of the parent and the state in the total educational process.

The New Hampshire Supreme Court did not address any of these issues. They were not invited to by counsel for either party. The court remanded the case to the Board to remedy procedural irregularities, which did no more than permit the plaintiffs to amend their application.

B. *New Hampshire Statutory Law: The Unspoken Policy of the* Peirce *Decision*

The *Peirce* decision contains no discussion of the justifications for the statute and regulatory law which governed its decision. Equally, the court provides no indication of the proper relationship between the home schooling regulations and the compulsory attendance statute. However, precedents that would compel the court to uphold the compulsory attendance statute do reveal the policies supporting the New Hampshire school law. The fundamental precedent is the 1929 New Hampshire Supreme Court case of *State v. Hoyt*,[18] confirmed by the court in its 1974 decision in *In Re Davis*.[19] An understanding of *Hoyt* brings out the sharp contradiction between the compulsory attendance statute and the State Board of Educations' home schooling regulations.

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16. *Id.* at § 2.2.
17. 122 N.H. at 765, 451 A.2d at 365.
18. 84 N.H. 38, 146 A. 170 (1929).
19. 114 N.H. 242, 318 A.2d 151 (1974).

State v. Hoyt involved a challenge to the constitutionality of the New Hampshire compulsory attendance statute.[20] That statute provided, as it does today, that

> Every child between 6 and 16 years of age shall attend *the public school* within the district or a public school outside the district to which he is assigned *or an approved private school* during all the time the public schools are in session, unless he has been excused from attending on the ground that his physical or mental condition is such as to prevent his attendance or to make it undesirable.[21]

As one would expect, much of what the *Hoyt* court said in 1929 has not withstood the passage of time: "The object of our school laws is not only to protect the state from the consequences of ignorance, but also to guard against the dangers of 'incompetent citizenship' . . . . The power to supervise necessarily involves the power to reject the unfit, and to make it obligatory to submit to supervision."[22] Today, the idea that the state has the right to reject the "unfit" would not be so easily accepted, nor would the idea that the primary focus of education is simply the protection of the state.[23] The latter may well be a valid policy, but only in a larger, more balanced view of education, a view that must surely also include the desires of the individuals affected.[24]

The *Hoyt* court was correct in rejecting the plaintiffs' alleged right to be free from *all* state supervision in educating their children.[25] The court did not err in setting down the test around which to assemble the relationship of the parent and the State in education. The court said that the parents had to submit to "reasonable" regulations in educating their children. The State has the right to impose reasonable requirements to ensure that the interest which it has in the child's education is being protected.[26] The con-

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20. N.H. REV. STAT. ANN. § 193:1 (1978). The plaintiffs in *Hoyt*, charged with violating the statute, defended on the ground that their children were being educated at home by a private tutor.

21. N.H. REV. STAT. ANN. § 193:1 (1978) (emphasis added).

22. 84 N.H. at 39-40, 146 A. at 171 (quoting Fogg v. Board of Educ., 76 N.H. 296, 299, 82 A. 173, 175 (1912)).

23. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). *See generally* Farrington v. Tokushige, 273 U.S. 284, 299 (1927); Pierce v. Society of Sisters, 268 U.S. 510, 514-15 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

24. *See, e.g.*, Kentucky State Bd. For Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979).

25. 84 N.H. at 41, 146 A. at 171.

26. Wisconsin v. Yoder, 406 U.S. at 213.

cept of reasonableness, however, is infinitely malleable. That malleability derives from the need to balance the competing values involved. Although one might disagree on the ultimate balance reached, few would disagree with the statement that reasonableness imports a balancing requirement. The *Hoyt* court's analysis may have stopped short of a full statement on the issue when it said, "[t]he power 'reasonably to regulate,' to require attendance, good character of teachers, studies to be taught and those to be prohibited, all look to laying down rules for future conduct. As the statute does not exceed the exercise of these powers, it is held to be constitutional."[27] The court almost says no more than "prospective rules are reasonable, these are all prospective rules before us, therefore they are reasonable." This is shallow ground indeed upon which to build the foundation of New Hampshire's entire compulsory attendance law.

A reasonableness standard demands a three part analysis: identification of the parties directly affected, identification of the interests implicated, and a hierarchical arrangement of those interests prior to adopting a regulation or a decision on constitutionality which arranges the parties and interests in a working relationship in the education sphere.[28] The *Hoyt* court does not even begin such an analysis. It is little wonder that its assertion of state hegemony produces a relationship of parent-state-child in which the state is the predominant party and the only one with effective decision-making power. The parent is left with nothing but a narrow public school/private school choice.[29]

Before leaving consideration of the *Hoyt* case it is imperative to note one of its enduring legacies because of its effect upon the legality of home schooling. The court stated,

> [e]ducation in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for dis-

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27. 84 N.H. at 41, 146 A. at 171.

28. Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE L. REV. 563, 568-80 (1982).

29. The *Hoyt* court, in commenting upon the burden of supervision which would fall to school districts if alternatives to public or private schooling were permitted, concluded: "[I]f any substantial supervisory power remains to the states, it is not perceived how it could well be reduced below the minimum required here." *Hoyt*, 84 N.H. at 41, 146 A. at 171.

charging the duties of a citizen.[30]

Socialization is an important element in any reasoned definition of "education." More problematic is the *Hoyt* court's assertion that it should take place in a state institution through forcible coalescing of all strata of society.[31] Non-state institutions, catering to elite segments of our society, appear to provide acceptable socialization. There appears no reason inherent in the nature of socialization why exclusive reliance should be placed on a public state institution. Equally, there is no reason why those unable to attend elite private institutions should be forced to rely exclusively on public institutions for the cultural and social education of their children. If socialization is a required element in education, it should be included in a set of reasonable state regulations governing home schooling. Such a requirement can be met in a number of ways, in different settings. Neither the states nor the public schools are exclusive repositories of socialization values in contemporary America. The *Hoyt* court's reliance on this factor needs to be reevaluated by the New Hampshire Supreme Court in light of contemporary citizens' demands from education. It is also probably constitutionally impermissible to relegate the socialization of children solely to the State through its public schools.[32]

Similar reconsideration should be given to the *Hoyt* court's evaluation of the state's regulatory capability. According to *Hoyt*, the state is incapable of evaluating a child's educational progress without also incurring great expense.[33]

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30. *Id.* at 39, 146 A.2d at 170-71.

31. "[T]he idea that schools mix together in happy groups children from widely differing backgrounds is for the most part simply not true." J. HOLT, TEACH YOUR OWN 40 (1980).

32. Stocklin-Enright, *supra* note 26, at 599-601.

33. The court noted:

> In the adjustment of the parent's right to choose the manner of his children's education, and the impinging right of the state to insist that certain education be furnished and supervised, the rule of reasonable conduct upon the part of each towards the other is to be applied. The state must bear the burden of reasonable supervision, and the parent must offer educational facilities which do not require unreasonable supervision.
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> If the parent undertakes to make use of units of education so small, or facilities of such doubtful quality, that supervision thereof would impose an unreasonable burden upon the state, he offends against the reasonable provisions for schools which can be supervised without unreasonable expense. The state may require, not only that educational facilities be supplied, but also that they be so supplied that the facts in relation thereto can be ascertained, and proper direction thereof maintained, without unreasonable cost to the state. Anything less than this would take from the state all efficient authority

The educational philosophy of the court leads inexorably to the conclusion that education can only occur in institutions where large groups of children are supervised by adults whose sole task is schooling. To accept this premise is to preclude parental supervision of a child's education. This would sound the death knell of home education without necessarily furthering any legitimate state interest. If the interest in avoiding supervision of small school units is fiscal, then it is not impossible to adopt alternative methods of efficient evaluation which obviate the need to visit each home school. Oregon's home schooling provision, for example, requires the parent to present the child for annual testing.[34] The need for an institutional setting as the central concept in a state's educational philosophy precludes recourse to such a convenient device.

New Hampshire's restrictive definition of education is unjustified both legally and philosophically. Neither the state interest nor the child's requirements in education makes the choice of an institutional "school" ineluctable. This is conceded by the concurrence in *Peirce*.[35] The plaintiff in *Peirce* did not present a constitutional challenge to the state's power to define narrowly the parent's role in education. Nevertheless, the concurring opinion did address this important issue.[36] The concurrence raises the possibility that, given an appropriate occasion, some members of the New Hampshire Supreme Court may well be willing to overrule *Hoyt*. When the court reconsiders the *Hoyt* decision a more expansive role for the parent may be laid down. If that occurs, the legislature will be forced to move beyond the present private school/public school dichotomy in its education statute, either to permit a definition of private school that deemphasizes the institutional element of "education" or to open up a new category of "home schooling." That remains for the future. The justices who made up the concurrence in *Peirce* apparently set out to deliver an essay on the "American" principles underlying compulsory education. They espoused a philosophy which opposes *Hoyt*, seemingly unaware of that precedent; the concurrence failed even to cite *Hoyt*. Instead the concurring justices presented a federal fourteenth amendment position that

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to regulate the education of the prospective voting population.

84 N.H. at 41, 146 A. at 171.

34. Or. Rev. Stat. § 339.030(6)(b) (1973).

35. 122 N.H. at 767-69, 451 A.2d at 366-68.

36. *Id.*

would ultimately place primary decision-making power in the hands of the parents.[37] The state's primary role would be as regulatory overseer, not as primary initial decision-maker.

The concurring justices stated that,

> [i]n *Wisconsin v. Yoder* . . . the Court concluded that a State could not compel Amish children to attend high school in violation of their religious beliefs. Although *Yoder* was a first amendment decision, language in the opinion, reminiscent of that in *Peirce* and *Meyer*, suggests that parents may have a fundamental right to control the education of their children. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition . . . ."[38]

The concurrence rejected the institutional philosophy of education contained in the *Hoyt* case. It concluded that while "the State may adopt a policy requiring that children be educated, it does not have the unlimited power to require they be educated in a certain way at a certain place . . . . Home education is an enduring American tradition and right."[39]

Rejection of the position that the state can compel a specific institutional format for education is an implicit rejection of the *Hoyt* philosophy. Thus, in an appropriate case in the future, the present New Hampshire statute may be held unconstitutional. The legislature would then have to fashion a non-institutional educational option. Before that time, the legislature should be encouraged to respond to the challenge of the *Peirce* concurrence and enact a solution to the dilemma posed by the current compulsory attendance statute. This is an appropriate point at which to consider the administrative muddle created by the parties, and possibly even the *Peirce* court's implicit acceptance of New Hampshire's home schooling regulations. Thereafter, it will be useful to set the New Hampshire position in the context of home schooling

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37. *Id.* at 767-69, 451 A.2d at 366-68.

38. *Id.*, 451 A.2d at 367. "Indeed," the court continued, "at common law the parents' authority over the education of their children was unquestionably a natural right which arose out of those parental responsibilities." *Id.* at 768, 451 A.2d at 367. "[A]pproval requirements for non-public school education may not unnecessarily interfere with traditional parental rights." *Id.* at 769, 451 A.2d at 367-68.

39. *Id.* at 768-69, 451 A.2d at 367.

law nationally.

C. *The New Hampshire Board of Education: The Home Schooling Regulations.*

New Hampshire's compulsory attendance statute is contained in Chapter 193 of the New Hampshire Revised Statutes Annotated.[40] To understand the relationship between compulsory attendance and home schooling in New Hampshire it is necessary to understand Chapter 193, sections 193:1 and 193:3. Section 193:1 is the core provision of the compulsory attendance statute, providing that "[e]very child between 6 and 16 years of age shall attend the public school within the district *or* a public school outside the district to which he is assigned *or* an approved private school during all the time the public schools are in session."[41] This provision first found expression in the statutory law of New Hampshire in 1903.[42] It was this section which the *Hoyt* court,[43] in 1929, interpreted to mean that compulsory attendance required either public or private school attendance.[44] The statute provided then, as it provides today, for only two ways to satisfy the duty to attend a school. No non-school option, such as home schooling, has been sanctioned by either the legislature or the judiciary in New Hampshire.

In 1980, the New Hampshire State Board of Education provided a non-school option by administrative fiat when the Board adopted its "Regulations and Procedures Pertaining to Home Education Programs in New Hampshire."[45] Although the regulations expired in July, 1982, they continue in force as the basis for decisions on home education. A new set of regulations, essentially the same as those under review here, are being written. The new regulations will contain amendments that are procedural in nature. The substance of the regulations will remain unchanged.[46]

Before discussing the requirements of New Hampshire's home schooling regulations, it is important to note the statutory basis under which they were promulgated. It is the statutory authority of the Board of Education that is questioned in this article. The

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40. N.H. Rev. Stat. Ann. § 193:1 (1977).
41. *Id.* (emphasis added).
42. 2B N.H. Rev. Stat. Ann. § 193:1 (citing 1903 N.H. Laws 13:1).
43. 84 N.H. 38, 146 A. 170 (1929).
44. *See id.* at 40-41, 146 A. at 171. *See supra* text accompanying note 37.
45. Regulations, *supra* note 5.
46. *See supra* note 5.

Board of Education's power to promulgate the regulations, presumably, is based upon a section within the compulsory attendance statute.[47] Section 193:3 grants to a local school board the power to reassign a child to a school in another district if attendance at the originally assigned school would "result in manifest educational hardship" to the child. Section 193:3 is a reassignment section. However, there is an exception within section 193:3 which provides that the State Board of Education may, instead of reassigning, "permit such child to withdraw from school attendance for such time as it may deem necessary or proper or make such other orders with respect to the attendance of such child at school as in its judgment the circumstances require."[48] A reading of the full section[49] shows that this latter language imports an exception into the power of reassignment.

Section 193:3 in one form or another has been a part of the compulsory attendance statute since 1921,[50] but it has not received much attention from the courts. The cases that construe it do so narrowly. For instance, in 1976 the Supreme Court of New Hamp-

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47. N.H. REV. STAT. ANN. § 193:3 (1977). Section 193:3 provides for the reassignment of a student to a school other than the one within her district. Thus it is a means of satisfying the compulsory attendance statute § 193:1 requirement of attending "a public school outside the district to which he is assigned." N.H. REV. STAT. ANN. § 193:1 (1978). Section 193:3 provides that any person whose duty it is to send a child to school and whose child has been assigned to a school or a special class for handicapped children may apply to the school board for reassignment to another school. If in that case the parent or guardian can show that attendance by the child at the originally assigned school would "result in a manifest educational hardship to the child," N.H. REV. STAT. ANN. § 193:3 (1978), reassignment to another school will be permitted. Section 193:3 is, thus, a reassignment power.

48. *Id.*

49. 193:3 Change of School of Assignment; Excusing Attendance:

> Any person having custody of a child may apply to the school board for relief if he thinks the attendance of the child to the school or special class for handicapped children to which he has been assigned will result in a manifest educational hardship to the child and, if the person having custody of the child is aggrieved by the decision of the school board, he may apply to the state board of education and the state board of education, after investigating the case and giving notice to the school board, may order such child to attend another school in the same district if such a school is available, or to attend school in another school in another district. In case the child shall be assigned to attend school in another district the district in which such child resides shall pay to the district in which such child attends tuition computed as provided in RSA 193:4. The state board of education may also permit such child to withdraw from school attendance for such time as it may deem necessary or proper or make such other orders with respect to the attendance of such child at school as in its judgment the circumstances require.

50. Lisbon Regional School Dist. v. Landaff School Dist., 114 N.H. 674, 676, 327 A.2d 727, 729 (1974).

shire, in *Swain v. State Board of Education*,[51] said that "[u]nder the terms of [193:3], the State board of education can only make a reassignment of a child previously placed in the system and cannot make an original assignment."[52] According to this reading of section 193:3, it is a *re*-assignment power, not an assignment power.[53] A student must be attending a public school within her district before the state board can reassign her to another school. "School" cannot, however, under *Hoyt* and the statutory provision it interpreted (section 193:1), mean a non-institutional "school." "School" presumably means the same thing (that is, an institutional arrangement) in section 193:3 as it does in section 193:1. Reassignment under section 193:3 means reassignment to an institutional arrangement, that is, either a public or private school.

Under section 193:3, to order reassignment, the Board of Education must find "manifest educational hardship." The exception which allows the Board to make discretionary dispositions whereby it decides *not* to reassign to a school, does not appear to incorporate the "manifest educational hardship" standard. It seems reasonable to infer that the discretionary exception was designed for the unusual and small number of cases where "manifest educational hardship" was an inappropriate standard. Whatever the standard that might be read into the exception to the section 193:3 reassignment power, however, it is not germane to an analysis of the home education regulations, because they are squarely based on the section 193:3 "manifest educational hardship" power. The "General Requirements" in Part I of the home education regulations state that

> [t]he decision to approve a home education program as an alternative to school assignment is the responsibility of the local school board, subject to appeal to the State Board of Education under RSA 193:3. Such home education program shall be approved under the following conditions:
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51. 116 N.H. 332, 360 A.2d 887 (1976).

52. *Id.* at 335, 360 A.2d at 889 (construing Landaff v. State Bd. of Educ., 111 N.H. 317, 282 A.2d 678 (1971)).

53. *Lisbon* is to similar effect:

> The statute under which the action of the State board was taken in this case provided for the change of a school assignment by the board in instances where the person having custody of a child thinks that attendance of the child at the school . . . to which he has been assigned 'will result in a manifest hardship to the child'.

114 N.H. at 675-76, 327 A.2d at 729.

> 2. A manifest educational hardship exists for the individual child . . . .[54]

Reliance by the Board on the power to reassign where there is a manifest educational hardship raises questions as to the legislative history and purpose of section 193:3.

The history of the reassignment power and the standard of "manifest educational hardship" demonstrate that the intended use of the section has not expanded or been amended substantially since 1921. The New Hampshire Supreme Court in 1974 in *Lisbon Regional School District v. Landaff School District*,[55] interpreting the legislative history of section 193:3, stated:

> Prior to the 1969 amendment, predecessor statutes, beginning in 1921 when the school laws were revised and codified, provided for reassignment by the State board when the custodian thinks it is "not for the best interest of the child to attend" the school of original assignment. Laws 1921, ch. 85, pt. III, § 3 . . . .
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> In 1969, the language of "manifest hardship" was grafted upon the section with which we are now concerned . . . .
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> . . . The amendment grew out of House bill 401, submitted by the Legislative Education Study Committee established under Laws 1967, ch. 287. The only change in RSA 193:3 proposed by this committee was the addition of a proviso assuring a "right of appeal" in case of assignment of a child to a special class or school for handicapped children. The body of the section would have continued to govern reassignment by the standard of the "best interest of the child". However House bill 401 was presented in new draft by the House Committee on Education which contained the language of "manifest hardship" appearing in the amendment as enacted. 2 N.H.H.R. Jour. 1103-1104 (1969). When the bill in its new form was approved in the senate, it was presented as "*another product of the education study commission which clarified certain provisions in the school laws and eliminated others*". N.H.S. Jour. 1090 (1969).[56]

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54. Regulations, *supra* note 5, at Part I.

55. 114 N.H. 674, 327 A.2d 727 (1974).

56. *Id.* at 676 (emphasis added). This history contradicts the assertion in a recent article that "[t]he current [New Hampshire] statute offers a limited equivalence type exception for cases where parents show a 'manifest educational hardship.'" Tobak and Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 DAYTON L. REV. 1, 20 n.132 (1982). The most that can be said is that the regulations attempt such an exception, one which is not supported by the statute. It is interesting that the authors rely for their author-

Those senators who approved section 193:3 would have been very surprised if they had been told that their "clarifying" amendment authorized a major change in educational policy. From a clarification of the section 193:3 power to reassign children within the public school system, the Board has wrenched the power to start a home schooling program. The language of the section and its legislative history speak against such a novel and unintended interpretation. Home schooling may be desirable, but so is legality and adherence to the rule of law.

New Hampshire's narrowly drawn compulsory attendance statute provides on its face only for either private or public school. The state supreme court in 1927 adopted an institutional definition of "school" which precludes home schooling from being a "private school."[57] That case was explicitly reaffirmed in 1974.[58] New Hampshire is recognized by leading commentators on compulsory attendance law as the state which offers parents the narrowest private-public school option, allowing no home schooling option at all.[59] Given New Hampshire's historical posture on home education, the 1980 regulations permitting home schooling are surprisingly expansive and turn out, at best, to be premised on a novel interpretation of the power to reassign students within the public school system. While not challenged in *Peirce*, the regulations may well be an impermissible use of administrative rule-making power.

The reassignment power could not have been intended to empower the Board to adopt the following expansive provision on home schooling:

> 2.2 *Educational Benefit.* The second category applies to those cases where an objective showing can be made by the parent that there are special benefits to be derived by the child from a *quality home education program* and that to deny the child an opportunity to receive such benefits would constitute an educational

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ity for this assertion on a survey conducted by the New Hampshire Education Department. *Id.* at 5 n.7. Independent analysis of the statute and its history might have led to a contrary conclusion.

57. *Hoyt*, 84 N.H. at 40, 146 A. at 171.

58. *Lisbon*, 114 N.H. at 676, 327 A.2d at 727.

59. "In most jurisdictions parents have the option of electing one of three different learning arrangements in order to comply with the compulsory attendance laws: public school, private school and in a scant majority of states, some non-school learning program." L. KOTIN & W. AIKMAN, *supra* note 3, at 88.

hardship.[60]

By this regulation, the Board has set up a home schooling program that is consistent with the proposition that the primary interest of the state is in ensuring that its future citizens can exercise the franchise. The regulations are also consistent with a secondary state interest in surveillance over the parent to ensure that parental educational choices are in the best interest of the child. The regulations recognize that the state is not the main decision-maker but that primarily the parent controls the child's education once reasonable minimal regulations by the state have been satisfied. The regulations are commendable in that they respond to parents' demands that the state recognize their constitutional right to be the primary decision-makers in their children's education.[61] The regulations, however, probably permit parents the widest choice and freedom of action permitted by any state in the country.

Aside from the spectre of reliance on a doubtful legal footing, the regulations carry with them other implications. That the child must first be assigned to a public school before the home school regulations can legally take effect clearly demonstrates that the state requires public schooling as the norm, rather than simply an alternative way of satisfying its interest that the franchise be exercised effectively.[62] Permitting parental choice through this overly circuitous route of administrative regulation may also indicate that the parent is being granted a precarious privilege. The length and continuity of a child's education are too important to place them on something so flimsy as administrative policy-making. Placing such important state policies in the discretion of politically unaccountable administrators is a decision worthy of criticism. The State Board of Education of New Hampshire is, in all probability, acting *ultra vires* in promulgating and enforcing its home schooling regulations; it may well be acting illegally. Its use of the compulsory attendance statute's reassignment power is tangled and beyond reasonable interpretation. The statute relied upon contains a major part, section 193:1, that has been interpreted by the New Hampshire Supreme Court to preclude the very thing the Board purports to do.[63] The Board's action requires the immediate atten-

60. Regulations, *supra* note 5, at Part II, § 2.2. *See also supra* note 11.

61. The support for this constitutional right is developed *infra* in section II.

62. *See Swain*, 116 N.H. 332, 360 A.2d 887.

63. Section 193:1 is the main provision of the compulsory attendance statute. It was interpreted in *Hoyt* to preclude home schooling. The present Board in its regulations on

tion of the legislature, either in repudiation or ratification.

Consideration by the legislature of home education should include the constitutional dimension of home schooling. It is on this aspect of home schooling that attention will now be focused.

II. Home Schooling and the Constitution: A Secular View

A. *The Federal Constitutional Basis For Home Schooling*

The constitutional analysis set forth here is confined to setting out the grounds for a secularly based constitutional right in parents to educate their children at home. The focus is thus narrowed for two reasons. First, New Hampshire's home schooling regulations are confined only to parents who can evoke a secular claim to educate their children.[64] Second, an adequate religious analysis would distort the focus of the present paper which is primarily sighted on New Hampshire's home schooling problems, not home schooling in general.

The threshold question concerns the proper interaction between the state's interest in education and a parental demand to educate at home with minimal state interference. The United States Supreme Court has yet to answer this question definitively. The Court has never been asked to pass judgment on the right of parents to teach their children at home, although it has expressed itself on the general relation between parents and the state in educational matters. It has done so, however, in only four cases this century regarding conflicts between private school institutions and the state.[65] Although parents were not involved directly in three of the four landmark decisions, it is to those four cases that reference must be had in formulating a statement of the parent/state relationship in the home school setting.

The three major cases in the 1920's were *Meyer v. Nebraska*,[66]

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home schooling seemingly overrules *Hoyt*. It does so by accepting home schooling as an adequate substitute for public schooling, without requiring an "institutional school" element. This is the very thing the parents in *Hoyt* were precluded from doing. The *Hoyt* parents' home school was held not to be a private school. Absent an "institutional" element, home schooling cannot satisfy the state's compulsory attendance statute.

64. Regulations, *supra* note 5.

65. Wisconsin v. Yoder, 406 U.S. 205 (1972); Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

66. 262 U.S. 390 (1923).

Pierce v. Society of Sisters,[67] and *Farrington v. Tokushige*.[68] This cluster of cases remained in isolation until 1972, when the Court, in *Wisconsin v. Yoder*,[69] was called upon to settle an issue concerning the decision-making power of the state in education. Commentators may differ over the full ramifications of these cases, but most would agree that one principle derived from them is that the state has the power to compel the parent to send his or her child to some school, not necessarily public, and that the state can subject the school to reasonable regulation. The consensus falls apart, however, when an attempt is made to define "school." Furthermore, "reasonable regulation" is usually only a starting point of analysis, for what is reasonable depends on hierarchically ordering the identifiable interests of the relevant parties. After examining these cases to see what light they shed on the parent/state relationship in education, one line of argument will be suggested by extension of those cases. This section will attempt to answer the central question: Where does parental power end and state power begin in education? It is assumed, and hereafter will be argued, that no definitive constitutional answer to this question exists at present.

Meyer involved a school teacher who was prosecuted for teaching German to a child in grade school in contravention of an "Americanization" statute forbidding anything other than English to be taught to any child who had not passed the eighth grade.[70] The Supreme Court held the statute unconstitutional as in excess of state power because it infringed the liberty protected by the fourteenth amendment.[71] The case is the starting point of Supreme Court authority supporting the power of the parents over their children's education. This is so even though no parent was represented when Meyer was arguing that the statute interfered with his choice of career.

Parental right came to the fore once more the year following *Meyer* when the Court decided the Oregon case of *Pierce v. Society of Sisters*. The defendants in *Pierce* were a private Catholic school and a military academy. Both were complaining about a recent Oregon statute that had as one of its objects the closing of all

67. 268 U.S. 510 (1925).
68. 273 U.S. 284 (1927).
69. 406 U.S. 205 (1972).
70. 262 U.S. at 396-97.
71. *Id.* at 399-403.

private grade schools in the state.[72] The Court held the statute unconstitutional following what it called the "doctrine" of *Meyer v. Nebraska*.[73] According to the Court,

> the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. 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.[74]

This firm stance in favor of parental right has to be balanced against passages in favor of confirming the power of the State. In this regard the Court in *Pierce* reassured the states:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[75]

These broad, rhetorical flourishes are difficult to apply in practice. Perhaps for that reason the Territory of Hawaii continued to enforce the provisions of Act 30, Special Session 1920: "An Act relating to foreign language schools and teachers thereof"[76] after the *Pierce* decision was handed down. The Hawaii statute attempted to supervise, in minute detail, foreign language schools and appeared, in particular, to have been directed toward Japanese language schools. In 1927 the Court held the statute to be unconstitutional.[77] In doing so it specifically reaffirmed *Meyer* and

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72. 268 U.S. at 529-30.
73. *Id.* at 535.
74. *Id.* at 534-35.
75. *Id.* at 534.
76. *See Farrington*, 273 U.S. at 290.
77. *Farrington*, 273 U.S. at 298-99.

Pierce as upholding fourteenth amendment liberty interests not only of owners of schools but also of parents and children.[78] There was a limit beyond which the State could not go and the Territorial government had overstepped that mark. The usefulness of *Farrington* is limited, however, by the absence of any indication of the precise boundaries of state power other than the conclusion that the detailed supervision in this statute went too far.

It was not until 1972, in *Wisconsin v. Yoder*,[79] that the Court had another opportunity to spell out the province of state activity in education. *Yoder* involved the Old Order Amish's challenge to Wisconsin's compulsory attendance statute.[80] They wanted to free their children of compulsory high school attendance.[81] In *Yoder* the Amish were successful in ousting the power of the state entirely after the eighth grade.[82] They did so on first amendment free exercise grounds, but that does not preclude its usefulness in a secular view of parental power in education. Despite Chief Justice Burger's attempt to confine the holding of the case to its factual and religious context,[83] *Yoder* nevertheless contains broad statements of fundamental principle that are not amenable to being distinguished in later cases. In commenting on the place of parental autonomy in western culture, Chief Justice Burger pointed out that, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."[84] He went on as follows: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children is now established beyond debate as an enduring American tradition."[85] Chief Justice Burger's concern for the values included in the parents' liberty interest caused him to reiterate, in a later per curiam decision, that "[f]ew familial decisions are as immune from governmental interference as parents' choice of a school for

78. *Id.*

79. 406 U.S. 205 (1972).

80. WIS. STAT. ANN. § 118.15 (West 1979).

81. *Yoder*, 406 U.S. at 209. Note that this is much more than most home schooling parents would normally be demanding. Most parents accept that *some* regulation by the state is to be expected.

82. *Id.* at 234. "[W]e hold . . . that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16."

83. *Id.* at 236.

84. *Id.* at 213-14.

85. *Id.* at 232.

their children, so long as the school chosen otherwise meets the educational standards imposed by the State."[86]

There are a number of points that can be extracted from the *Meyer-Pierce-Farrington-Yoder* line of cases. First, parents and state are both a part of the education decision. Second, parents have to ensure that the child attend *some* school, subject to reasonable regulation by the state. Third, for some purposes the parent is the primary decision-maker. In addition, the requirement that the child attend some school and that it be subject to reasonable regulation can be collapsed into one principle because "school," a vague concept at best, is usually defined in terms of reasonable state requirements: Examples are requirements on duration of attendance, teacher certification, curricular content, school accreditation process and approval, and fire and health standards. The constitution provides no definition of a school, nor does it mandate any set of state requirements. The reason has already been alluded to: Reasonableness is a concept which is dependent on an interest analysis for its content. If a "school" is an entity defined by "reasonable" state regulations, it becomes essential to clarify the meaning of "reasonable regulation" in this context. This requires one to identify the interests in education assertable by the parents and the state in order to assess the reasonableness of any one set of regulations. The regulations would be assessed for reasonableness against the hierarchical ordering of the interests identified. The priority of interest implicit in any such hierarchical ordering would have to be reflected in the state's regulations. As will be seen, other than identifying interests, the major problem is in deciding whether the state or the parent should be the primary decision-maker: Who is best suited by role and institutional position to be making this decision?[87] Before embarking on the interest analysis it will be instructive to survey a number of cases in which courts have been presented with aspects of the problem addressed here to see how they have fashioned their decisions from the available authorities.

In *Scoma v. Chicago Board of Education*,[88] a parents' federal civil rights suit against the state education authorities for injunctive relief from prosecution under the state compulsory attendance

86. Cook v. Hudson, 429 U.S. 165, 166 (1976) (Burger, C.J., concurring).

87. *Cf.* Tribe, *The Supreme Court, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 15-16 (1973).

88. 391 F. Supp. 452 (N.D. Ill. 1974).

statute was dismissed for lack of federal jurisdiction.[89] However, the court responded in dicta to the parents' constitutional claim to be entitled to educate their children at home. The court asserted that parents had no fundamental right to educate at home,[90] that it was not a denial of equal protection to discriminate against home schools in contra-distinction to private and public schools,[91] and that Illinois' compulsory attendance statute was not unconstitutionally vague.[92] The court's dicta, however, is not particularly enlightening as it simply repeats the principles in the *Meyer-Pierce-Farrington-Yoder* decisions and asserts that in light of the cases, the Illinois statute is "reasonable."[93] Indicative of the court's narrow approach is its statement that "[a]side from claims based on the exercise of religion clause, compulsory attendance statutes have generally been regarded as valid."[94] This is not untrue but it fails to point out that no case has *ever* been presented to the United States Supreme Court in which a statute has been challenged on secular grounds. Furthermore, parents proffering secular, constitutionally grounded arguments normally do so to restrict state power, *not* to oust it entirely.

A more closely reasoned case is *Hanson v. Cushman*,[95] in which the plaintiff parents advanced arguments similar to those in *Scoma*. In *Hanson*, the claim to a fundamental privacy right based on the penumbra of the first nine amendments and the fourteenth amendment to the United States Constitution focused on the state requirement of teacher certification.[96] The state did not deny that the parents had a right to educate their children at home; nevertheless they had to comply with state regulations.[97] If the parents' constitutional rights were conceded to be a fundamental interest, the state would have to show a compelling state interest in certified teachers; otherwise it would merely have to meet the burden of showing the reasonableness of its requirement. With little difficulty and relying on the Supreme Court decisions discussed

89. 42 U.S.C. § 1983 (Supp. IV 1980).
90. 391 F. Supp. at 460-61.
91. *See id.* at 460-62.
92. *See id.* at 462-63.
93. *Id.* at 461.
94. *Id.* (citing 79 C.J.S. *Schools and School Districts* § 463b).
95. 490 F. Supp. 109 (W.D. Mich. 1980).
96. *Id.* at 112.
97. *See id.* at 115.

above,[98] the court concluded that the parents did *not* possess a fundamental right to educate their children at home.[99] The parents could educate their children at home, but only if they met reasonable state regulations. Was the state requirement that parents who educate their children at home provide a certified teacher reasonable? According to the court it was:

> The state advances its interest in insuring the minimum competency of those entrusted to teach as justification for requiring certification of teachers. The distinction in treatment by the state between parents whose children are taught by state certified teachers, whether in a public or private educational institution or at home, and those parents who seek to educate their children at home without certified teachers, directly relates to the difficulty that the state would surely face in examining and supervising, at considerable expense, a host of facilities and individuals, widely scattered, who might undertake to instruct their children at home without certification; as compared with the less difficult and expensive mechanism of requiring certification as a standard for competency. This clearly satisfies the state's burden of acting rationally and reasonably.[100]

This language is interestingly reminiscent of the *Hoyt* case discussed earlier.[101] However, it suffers from a similar defect in that an implicit assumption in the court's analysis is that the state is the primary decision-maker in education. The counterpoint to that assumption is that there is no interest in the parent, or the child, that would cause this decision to be unreasonable. It is worthwhile pointing out that the result of deciding that the parents must have a state certified teacher is to preclude entirely the homeschooling option for many parents, even if the education provided is superior to that provided in the public schools. Balancing the complete denial of home schooling against the convenience of the state might produce a different result than that reached in *Hanson*, especially since the state interest in the adequacy of the home education could be ensured by examinations. This is the means used by many states in their public schools and is utilized by some states, such as Oregon,[102] for their home schooling pro-

98. *See supra* notes 56-76 and accompanying text.
99. 490 F. Supp. at 114.
100. *Id.* at 115.
101. *See supra* notes 16-32 and accompanying text.
102. Or. Rev. Stat. § 339.030(6)(b) (1981).

grams. Again it can be seen that the reasonableness analysis requires consideration of all the interests of all the parties and not just the convenience of state officials.

A court that appears sensitive to these issues is the Supreme Court of Ohio. In two recent decisions it has adopted the more parent-oriented aspects of the *Meyer-Pierce-Farrington-Yoder* line of cases and fashioned them into a strong constitutionally protected liberty interest which would allow parents primacy of decision-making in education. In *State v. Whisner*,[103] the court based its decision in favor of the parents on both free exercise of religion and fourteenth amendment grounds.[104] The parents' complaint was that the state's private school regulation was too detailed and therefore overly intrusive, going far beyond anything required by the state's interest.[105] The court agreed with the parents:

> [I]t has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a "fundamental right" guaranteed by the due process clause of the Fourteenth Amendment.
>
> The principle espoused in *Farrington, Pierce* and *Meyer* was recognized as contemporarily valid in *Wisconsin v. Yoder* . . . .[106]

Furthermore, the Ohio Supreme Court noted that:

> The "minimum standards" under attack herein effectively repose power in the state Department of Education to control the essential elements of non-public education in this state. The expert testimony received in this regard unequivocably demonstrates the absolute suffocation of independent thought and educational policy, and the effective retardation of religious philosophy engendered by application of these "minimum standards" to non-public educational institutions. . . . In short, what the state gives to a non-public school through including a requirement in the "minimum standards" that the operation of the school must be consistent with its own stated philosophy . . ., it takes away by compelling adherence to all the "minimum standards," the effect of which is to obliterate the "philosophy" of the school and impose that of the state.
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> . . . Under the facts of this case, the right of appellants to

103. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).
104. *Id.* at ___, ___, 351 N.E.2d at 764, 769.
105. *Id.* at ___, 351 N.E.2d at 761-64.
106. *Id.* at ___, 351 N.E.2d at 769.

> direct the upbringing and education of their children in a manner in which they deem advisable, indeed essential, and which we cannot say is harmful, has been denied by application of the state's "minimum standards" as to them.
> . . . In the opinion of a majority of this court, a "general education of a high quality" can be achieved by means other than the comprehensive regimentation of *all* academic centers in this state.[107]

These same "minimum standards" were condemned on similar grounds by the Ohio Supreme Court in its more recent decision, *State ex rel. Nagle v. Olin.*[108]

The common ground shared by these four decisions, the parent-oriented decisons of *Whisner* and *Olin* and the state-oriented decisions of *Scoma* and *Hanson*, is that they draw on the *Meyer-Pierce-Farrington-Yoder* decisions for legitimizing support. These Supreme Court decisions do appear to support both sides for the simple reason that they contain general propositions on the position of the family in western jurisprudence and do not provide a refined analysis of the actual interests in issue in home education. A framework for such an analysis will now be suggested.

To begin with it is necessary to identify the parties involved in the decision to educate at home. They include the state, the parents, and the child. It is important to remember that the child is a vitally interested party. The next step is to identify, from all the myriad interests imaginable, those that are sharply and directly implicated in this decision. Those interests appear to be three in number:

(1) the need for a citizenry adequately educated to operate the franchise;
(2) the demand of individuals to be self-reliant and self-sufficient members of their communities, and;
(3) the demands of individuals to be culturally viable.[109]

The first interest is primarily that of the state. To further that interest the state must, at a minimum, be able to dictate that certain subjects be taught to enable the child to understand the political culture in which he or she lives. The other two interests are

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107. *Id.* at ___, 351 N.E.2d at 770-71.

108. 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980).

109. The actual number of interests could be contracted or expanded depending upon phraseology. The three interests presented here capture the essence of the values often proferred in debates on education.

those of the child. The child has a primary interest in learning to earn a living, to be self-reliant and to be culturally viable; other members of the community have some lesser interest in ensuring that the child has an opportunity to acquire these skills.

The main issue is who is best suited to safeguard the child's interests. The choice is between the state and the parent. The best arrangement, given the familial structure of our society, is that the parent should be the primary decision-maker. The state, however, should retain an important but secondary surveillance role to ensure that the parent is acting in the best interest of the child. This assignment follows from the historic role which the law has commonly expected the family to perform. According to Chief Justice Burger,

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[110]

The expectation is that parents do act in the best interest of their children and that the law will be fashioned on that assumption, despite the fact that some parents do not live up to that expectation.[111]

To summarize, the state has a primary interest in ensuring that a child receive an adequate education in order to exercise the franchise competently. The state may dictate that certain directly relevant subjects be taught. Parents, on the other hand, have the primary decision-making role of ensuring that the child receive an adequate education for economic self-reliance and cultural viability. In this latter regard the state has a secondary interest in monitoring the parents' decision-making function to safeguard the best interest of the child. The constitutional "reasonableness" of any set of state compulsory attendance regulations must be evaluated within this decision-making structure. New Hampshire's present compulsory attendance statute usurps the primary decision-making function of the parent because it permits only an institutional

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110. Parham v. J.R., 442 U.S. 584, 602 (1979).

111. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603 (emphasis in original).

form of private school as an alternative to the public school. That requirement is unrelated to New Hampshire's interest in the operation of the franchise and is not reasonable in light of its limited interest in the education of the children within the state. For that reason New Hampshire's present compulsory attendance statute is unconstitutional. As will be seen from the discussion in the following section, New Hampshire's statute stands alone in the country in the narrowness of options it offers to parents' decision-making role.

III. State Schooling Law

A. *The Compulsory Attendance Statutes*

A study of the compulsory attendance statutes in the United States reveals that there are usually three methods by which a parent can satisfy the state's educational requirements: the parent may send her child to a private school, or to a public school; a third alternative requires compliance with a non-school category—requiring some equivalent mode of instruction. Parents wishing to educate their children at home frequently adopt the non-school option or, where it is more suitable, a private school may be set up. On the whole, state compulsory attendance statutes are not a barrier to home schooling except in a very few states: Washington[112] and New Hampshire are notable examples.

Kotin and Aikman, concluded in their treatise[113] that:

> Since all states are constitutionally compelled to allow instruction in private schools and the Compulsory Attendance Statutes of at least thirty-two states explicitly, implicitly or by judicial construction allow instruction through non-school learning arrangements, there is ample statutory basis for the establishment of a variety of acceptable alternatives to public school attendance.[114]

These alternatives are available unless one is in a state where the definition of "private school" is so restrictive as to preclude effective parental decision-making in education. In most states home schooling is a legally viable option.[115] Even where the state statute does no more than provide for either public or private school at-

112. Wash. Rev. Code Ann. § 28A.27.010 (1982).
113. L. Kotin & W. Aikman, *supra* note 3.
114. *Id.* at 129.
115. *See supra* note 58.

tendance, home schooling is not necessarily precluded. On the contrary, as noted by Kotin and Aikman,

> None of these requirements [for private school] singly nor all of them in combination constitute an insuperable bar to utilizing the "private school" rubric as a vehicle for non-traditional learning arrangements. *With the exception of New Hampshire*, which does appear to have certain requirements for private schools of an "institutional" nature, the case law of every jurisdiction which has reached negative conclusions on the issue [of home schooling in some of its cases] does, on a close reading, seem amenable to the possibility of having "private school" mean something quite different from the ordinary connotations of that term.[116]

Therefore, even in those few states that set relatively high standards for "private school" approval, as in Washington,[117] home schools are still feasible. Home schools receive approval under compulsory attendance statutes as "private schools" even in states not favoring home instruction in general.[118]

Under the present administrative interpretation of New Hampshire law, it is possible to meet the state's educational policies in the home schooling context by satisfying the regulations. But, this will still not satisfy the compulsory attendance statute itself, as interpreted by the New Hampshire Supreme Court in *Hoyt*, for want of an institutional setting.[119] In this regard New Hampshire's statutory law stands alone: Its requirements are not functionally related to its educational objectives.

New Hampshire is at one extreme in its adherence to anachronistic structural requirements in its compulsory attendance statute. It may nevertheless find some limited support in the case law of other states. The limited support for the New Hampshire position stems from the state's role as primary decision-maker in the parent/state education relationship, rather than from any requirement which defines "school" as an institution where groups gather

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116. L. KOTIN & W. AIKMAN, *supra* note 3, at 166 (emphasis added).

117. WASH. REV. CODE ANN. § 28A.27.010 (1982) requires that "[a]n approved private and/or parochial school for the purposes of this section shall be one approved under regulations established by the state board of education . . . ." *See also* WASH. REV. CODE ANN. § 28A.02.201 (1982) establishing the "minimum state controls necessary to insure . . . a sufficient basic education" for students in private schools.

118. Washington is a good example of such situations. *See* State *ex rel.* Shoreline School Dist. v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1959).

119. *Hoyt*, 84 N.H. 38, 40, 146 A. 170, 171 (1929).

for instruction.

B. *State Case Law on Home Schooling*

Three-quarters of the states permit home schooling either as an "equivalent" to public schooling or as a form of "private schooling."[120] The central issue is whether the parent or the state has the primary decision-making role in education. If the parent has the primary right, subject to reasonable state regulations, then unless home education is *per se* unreasonable, New Hampshire is usurping the right of parents to choose a home centered education. The constitutionality of the New Hampshire position has already been questioned elsewhere.[121] The following is an evaluation of selected recent state cases; this will be useful to gauge the extent of the power that New Hampshire might claim in redressing its compulsory attendance statute.

C. *A State Dominated Education Decision: The Meaning of "Reasonable Regulation"*

There are a number of cases that can be cited as authority for a narrow power in the parents to make educational decisions and a correspondingly wide power in the state. Few cases, however, are as well reasoned as that of the Supreme Court of North Dakota in *State v. Shaver.*[122] In *Shaver,* the defendants protested their convictions under the compulsory attendance statute[123] on first amendment freedom of religion grounds and on the right of parents to guide the upbringing of their children.[124] While cast as a

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120. Only seven state compulsory attendance statutes regard private school as the only schooling alternative:

> GA. CODE § 20-2-642 (1981) (grants are provided for public funds in lieu of public school, to be used to attend nonsectarian private school in any state, in the United States or public school outside the state, in an amount equal to average state cost per pupil); LA. REV. STAT. ANN. § 17:236 (West 1982) (definition of a school includes home study, considered a day school). Grants for private education were repealed by 1962 LA. ACTS No. 147, § 11; MINN. STAT. ANN. § 120.10 (West Supp. 1983) ("Every child between seven and 16 years of age shall attend a public school, or a private school, . . ."); N.H. REV. STAT. ANN. § 193:1 (1978); TENN. CODE ANN. § 49-1708 (1977) ("public or private day school"); TEX. EDUC. CODE ANN. § 21.033(1) (Vernon Supp. 1982) ("private or parochial school, which shall include in its course a study of good citizenship").

121. Stocklin-Enright, *supra* note 28.

122. 294 N.W.2d 883 (N.D. 1980).

123. N.D. CENT. CODE § 15-34.1-01 (1981).

124. *Shaver,* 294 N.W.2d at 888.

free exercise claim, the court focused on the reasonableness of North Dakota's attendance statute. The court summarized the state school law as requiring three things:

> (1) The teachers must be legally certified in the state of North Dakota in accordance with Section 15-41-25 and Chapter 15-36, N.D.C.C.;
> (2) The subjects offered must be in accordance with Sections 15-38-07, 15-41-06, and 15-41-24, N.D.C.C.; and
> (3) The school must be in compliance with all municipal and state health, fire, and safety laws.[125]

The parents were using the Accelerated Christian Education (ACE) curriculum, a standard correspondence course emphasizing Christian teachings, thus the court did not envisage that the church school would have problems with the curriculum requirement of the compulsory attendance statute.[126] Likewise, there were no substantial doubts raised about the fire and health regulations.[127] The court focused on the absence of certified teachers at the church "school." On this the court said,

> We recognize that certification does not necessarily equate with teaching competence in every instance, but we believe it is a reasonable tool and one which the Legislature may utilize in attempting to assure not only for the present, but for the future, quality education for all children in conjunction with carrying out the mandate of the state constitution.[128]

The court would permit the state to demand state certified teachers.[129] State certification requires the satisfactory completion of a baccalaureate program in education. Certification was the only substantive issue that the court was asked to address directly. It did so in favor of state regulation. As part of that analysis it also set forth its view of the role of the state in the education sphere. The court was of the opinion that,

> The State of North Dakota has a recognized and *conceded* interest in assuring the sufficient education of the children of the residents of the state to enable them to be viable

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125. *Id.* at 893.

126. *Id.* at 894.

127. *Id.* at 895 ("[N]or does the record reveal whether or not the Bible Baptist School is complying with such laws.").

128. *Id.* at 894.

129. *See id.* at 897 ("There is no doubt that the state has the power to impose *reasonable* regulations for the control and duration of a basic education.") (emphasis in original).

citizens in the community.[130]

In response to the parents' assertion that they possessed a fundamental right to educate their children, the court said,

> While we are cognizant of and have carefully examined the United States Supreme Court decisions which have recognized the traditional right of parents to direct the upbringing and education of their children, . . . we are also aware of the United States Supreme Court's observation in *Yoder* wherein it said that:
>
> > "*Pierce* [268 U.S. 510, . . . (1925)], of course, *recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.*"
>
> For this reason, we believe that the right of parents to direct the upbringing and education of their children is subject to reasonable state regulation pursuant to the state's police powers. We have not been shown wherein the state's laws are unreasonable.[131]

Absent a claim of a fundamental right or a specifically enumerated constitutional right, no serious argument can be made against the proposition that the state has a reasonable right to regulate the education decision. If the standard is "reasonableness," it is essential that one enumerate and hierarchically order the competing interests in order to present an adequate response. But the North Dakota court simply stated that "we have not been shown wherein the state's laws are unreasonable."[132] *Shaver* may be no more than a reaction to the claims and the facts presented by the parents *in this particular* case. On a fully argued record, attacking the philosophical and factual basis of the compulsory attendance requirements, the court might be persuaded that the North Dakota's statute is too broad.

It is doubtful that the teacher certification requirement would withstand a rigorous "reasonableness" analysis, since the requirement is likely too broad to satisfy the state's actual interest in the

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130. *Id.* at 897 (quoting N.D. CONST. § 147) (emphasis in original).
131. *Id.* at 899 (quoting Wisconsin v. Yoder, 406 U.S. at 233) (emphasis in original).
132. *Id.* at 899.

issue. Nevertheless, the North Dakota position is typical of those states that place the preeminent power in education with the state. Even so, it is far less restrictive than New Hampshire's position. Under North Dakota law,[133] a parent who was certified could teach her child through a correspondence course and could be approved as a "private school." Even that overly restrictive option is not available under New Hampshire's compulsory attendance statute's definition of "private school."[134]

D. *The Parents As Primary Decision-Makers*

In *Kentucky State Board for Elementary and Secondary Education v. Rudasill,*[135] the court had to decide the effect of section five of the Kentucky Constitution on the compulsory attendance statute's[136] provision for the approval of private schools. Section five provides that "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed . . . ."[137] This has the same effect at the state level in Kentucky, as did *Pierce v. Society of Sisters*[138] at the federal level.

In *Pierce* the United States Supreme Court said that Oregon could demand attendance at *some* school, but it could not require attendance at public school as the exclusive means of satisfying the compulsory attendance statute. The Kentucky Supreme Court, in *Rudasill,* interpreted section five of the Kentucky Constitution to mean that the state could compel attendance at some school, but not necessarily a state school.[139]

In *Rudasill,* the three requirements for approval[140] which the private school had to meet in order to be approved were balanced against the state's interest. According to the court, the only interest which the state had in the child's education was ensuring that the child would be able to exercise the franchise adequately.[141] The

133. N.D. CENT. CODE § 15-34.1-03 (1981).
134. N.H. REV. STAT. ANN. § 193:1 (1978).
135. 589 S.W.2d 877 (Ky. 1979).
136. KY. REV. STAT. ANN. § 158.080 (Bobbs-Merrill 1980).
137. KY. CONST. § 5.
138. 268 U.S. 510 (1925).
139. *Rudasill,* 589 S.W.2d at 882-83.
140. Private schools must (1) "be taught in the English language" (2) "offer instruction in the several branches of study required to be taught in the public schools" and (3) operate not "for a shorter period in each year than the term of the public school" in the district. KY. REV. STAT. ANN. § 158.080 (Bobbs-Merrill 1980).
141. *Rudasill,* 589 S.W.2d at 883.

state could demand that certain subjects be taught if they were rationally related to the need for an educated citizenry able to exercise the franchise. The durational requirement was tied to the number of days attended in the state public schools and was acceptable under this standard.[142]

The teacher certification requirements, however, were beyond the power of the state to demand. The court said that,

> It cannot be said as an absolute that a teacher in a non-public school who is not certified under [the education statute] will be unable to instruct children to become intelligent citizens. Certainly, the receipt of "a bachelor's degree from a standard college or university" is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelligently exercise the elective franchise.[143]

A requirement that books for private schools be chosen from a state approved list was also said to be beyond the power of the state.[144] To admit such a power would allow the state to do covertly that which it was not allowed to do overtly—that is force everyone to attend public schools. This is no more than the United States Supreme Court said fifty-two years earlier.[145]

A similar result was reached in Massachusetts in *Perchimledes v. Frizzle*,[146] where the court allowed broad parental discretion. The heart of the *Perchimledes* decision recognizes parental freedom of choice in educating and rearing children as a basic liberty protected by the fourteenth amendment to the United States Constitution. The court stated,

> Thus, parents need not demonstrate a formal religious reason for insisting on their right to choose other than public school education since the right of privacy, which protects the right to choose alternative forms of education, grows out of

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142. *Id.* at 884.

143. *Id. See also*, A. NEILL, NEILL! NEILL! ORANGE PEEL! (1972) where the author states:
> By law, I must have qualified teachers. Not that an academic background makes much difference, for I have had both trained and untrained teachers with varying results. Obviously, teaching is an art, not a science; a teacher is born, not made. But the law is there, and Picasso could not get a job as an art teacher in England because he has no certificate.

144. 589 S.W.2d at 883-84.

145. Farrington v. Tokushige, 273 U.S. 284 (1927).

146. No. 16641 (Mass. Sup. Ct., Nov. 13, 1978).

> constitutional guarantees in addition to those contained in the First Amendment. Non-religious as well as religious parents have the right to choose from the full range of educational alternatives for their children.
>
> There will remain little privacy in the "right to privacy" if the state is permitted to inquire into the motives behind parents' decisions regarding the education of their children. As plaintiffs in *Pierce* included a secular military academy, and the holding in that case did not mention religious beliefs or the Free Exercise clause of the First Amendment.
>
> Without doubt, then, the Massachusetts compulsory attendance statute might well be constitutionally infirm if it did not exempt students whose parents prefer alternative forms of education.[147]

Under either the Kentucky or the Massachusetts approach, the New Hampshire compulsory attendance statute, as interpreted by *Hoyt*[148] and *Davis*,[149] is unconstitutionally narrow.

IV. The Next Step For New Hampshire

The next step for New Hampshire is to realize that even under a restrictive reading of the parents' right of decision, such as that taken in North Dakota's *State v. Shaver*,[150] a parent has the right to educate her children at home once a reasonably defined set of regulations for approval has been met. The New Hampshire statute, *at a minimum*, must be amended to remove the narrow construction of *Hoyt*, and to allow parents to set up private schools or some alternative arrangement to educate their children at home.

Even amending the statute to comport with the narrowest definition of the parental right to education would still leave it susceptible to attack on the constitutional grounds that Kentucky and Massachusetts have recognized. The threat of a constitutional attack is all the more real because it is unresolved whether it is a criminal offense or a fundamental constitutional right for parents to educate their own children. This state of uncertainty, in light of New Hampshire's recent experience with home schooling, calls for a new legislative strategy. The legislature should recognize the par-

147. *Id.*, slip op. at 9.
148. 84 N.H. 38, 146 A. 170 (1929).
149. 114 N.H. 242, 318 A.2d 151 (1974).
150. 294 N.W.2d 883 (N.D. 1980).

ent as the primary decision-maker, once the state has been assured that its interests are safeguarded and that the parent will be acting in the best interests of the child.

A. *An Amendment to the Compulsory Attendance Statute*

The tortured logic, which interprets the reassignment provision to allow home schooling, calls for legislative remedy. This is particularly true in a state which is nationally viewed as having one of the narrowest compulsory attendance statutes in the country, and especially so when, as here, the section deals with children who have mental, emotional and physical problems and speaks in terms of "manifest educational hardship."[151] A simple legislative amendment such as Colorado's compulsory attendance statute[152] would remedy the situation. Colorado's statute provides that,

> (1) Every child who has attained the age of seven years and is under the age of sixteen years, except as provided by this section, shall attend public school for at least one hundred seventy-two days during each school year, or for the specified number of days in a pilot . . . program which has been approved by the state board under section 22-50-103(2).
>
> (2) The provisions of subsection (1) of this section shall not apply to a child:
>
> . . .
>
> (i) Who is being instructed at home by a teacher certified pursuant to articles 60 and 61 of this title, or *under an established system of home study approved by the state board.*[153]

If such a provision were adopted in New Hampshire, the State Board of Education could keep its present regulation. Home schooling could then take its place as one of three options under the compulsory attendance statute—the other two being public and private school. The parents' constitutional right to educate their children, once reasonable state regulations are met, would be recognized and New Hampshire would then fulfill important state responsibilities openly and unambiguously.

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151. N.H. Rev. Stat. Ann. 193:3 (1978).
152. Colo. Rev. Stat. § 22-33-104 (1973 & Supp. 1982).
153. *Id.* (emphasis added).

Conclusion

An analysis of the New Hampshire compulsory attendance statute and the leading state case law interpreting its provisions leads to the conclusion that only a public or a private school will satisfy the statute. "Private school" is defined by the leading New Hampshire Supreme Court case, *State v. Hoyt*,[154] as connoting an institution, effectively precluding home schooling. This has long been the accepted situation in New Hampshire, reconfirmed by the New Hampshire Supreme Court as recently as 1974, never altered by the legislature, and acknowledged by national educational commentators. The law relating to home schooling and compulsory attendance throughout the country spans a wide spectrum. State laws range from strict adherence to curriculum content stipulations and teacher certification requirements to permissive endorsements of the parental right to educate, once state interests are satisfied by the parent. New Hampshire's compulsory attendance statute is the most restrictive in the United States, yet its administrative regulations make it one of the most permissive. Behind all of this lies the uncertain contours of the parents' constitutional role in educating their own children. Viewed from any perspective, New Hampshire's present law is perplexing. Hopefully, the legislature of New Hampshire, working together with parents and other educators, can articulate the legal norms which govern the education decision. Only then can New Hampshire remove the present contradiction and illegality in its administrative and legislative commands.

154. 84 N.H. 38, 146 A. 170 (1929).