UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 64 | Number 6 Article 5

8-1-1986

Education Law

North Carolina Law Review

Delconte v. State: Some Thoughts on Home Education

Home instruction as a means of satisfying a state's compulsory education requirements often results from parental dissatisfaction with public school systems. It has been estimated that thirty thousand families in the United States now instruct their children in their homes.[1] Parents opt to teach their children at home for a variety of reasons. Some parents "see the public school, or publicly approved private schools, as too traditional or conservative."[2] Other parents choose to educate their children at home because they are concerned about a "general moral breakdown in the public schools and the lack of religious values in public education."[3] Advocates of alternatives to public educational institutions contend that the quality of public schools is generally very poor.[4] Parents opposed to public education "share a common disenchantment with the

---

1. *See* Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189, 192 & n.10 (1983); Ward, *What Happens When Parents Turn Teachers*, N.Y. Times Winter Survey of Education, Jan. 10, 1982, § 13, at 3. Other estimates place the number at 20,000. Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191, 193 & n.19 (1981). At least 400 home schools exist in North Carolina. *Number of home schools grows to 400 in N.C.*, The News and Observer (Raleigh, N.C.), July 27, 1986, at 1A, col. 5. "In all, about 1,000 to 1,500 Tar Heel children may be getting their education at home, out of 58,000 private-school students statewide." *Id.*; *see also Forsyth Woman educates her own children at home*, The News and Observer (Raleigh, N.C.), Nov. 12, 1985, at 16C, col. 2 (at the time of the article approximately 250 North Carolina families operated home schools). Approximately one million children attend Christian Day Schools. Devins, *A Constitutional Right to Home Instruction?*, 62 WASH. U.L.Q. 435, 435 n.4 (1984).

2. Lines, *supra* note 1, at 190. A few parents have attempted to teach their children at home for reasons unrelated to dissatisfaction with public schools. *See* City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979) (child with hearing problems); *see also* Abrahamson, *We are Not Immune*, 10 DISTRICT L., Sept.—Oct. 1985, at 6, col. 3 (incidents in which parents have removed their children from public school to avoid danger of contracting Acquired Immune Deficiency Syndrome); Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. FAM. L. 353, 363 nn.49-51 (1979-80) (removal of children from public schools for various unusual reasons).

3. Devins, *supra* note 1, at 438; *see* Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. REV. 847; Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978). For a comprehensive discussion of parental dissatisfaction with the public school system, see Devins, *State Regulation of Christian Schools*, 10 J. LEGIS. 351 (1983) [hereinafter cited as Devins, *State Regulation*]. *See also* Devins, *Fundamentalist Schools vs. The Regulators*, Wall St. J., Apr. 14, 1983, at 26, col. 3 (growth of Christian day schools).

4. *See, e.g.*, A BLUEPRINT FOR EDUCATIONAL REFORM (C. Marshner ed. 1984); L. BUZZARD, SCHOOLS: THEY HAVEN'T GOT A PRAYER (1984); M. GABLER & N. GABLER, WHAT ARE THEY TEACHING OUR CHILDREN? (1985); P. GOODMAN, COMPULSORY MIS-EDUCATION AND THE COMMUNITY OF SCHOLARS (1964); J. HOLT, HOW CHILDREN FAIL (1967); J. HOLT, TEACH YOUR OWN (1981); I. ILLICH, DESCHOOLING SOCIETY (1970); E. REIMER, SCHOOL IS DEAD (1971); V. SMITH, ALTERNATIVE SCHOOLS (1974); S. SUGARMAN & J. COONS, EDUCATION BY CHOICE (1978). For general criticism of public education, see J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE SCHOOLS COMPARED (1982) (private schools generally do a better job of educating children than public schools); NATL. COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE OF EDUCATIONAL REFORM (1983) (report recommending restoration of core curriculum requirements and discipline in the public schools).

For a discussion of the difference between mere "schooling" and "education," see Stocklin-Enright, *The Constitutionality of Home Education: The Role of The Parent, The State And The Child*, 18 WILLAMETTE L. J. 563, 564-65 n.9 (1982) (discussing L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 71 (1980)).

academic and social environments of public schools."[5]

The legality of home education was squarely presented to the North Carolina courts for the first time in *Delconte v. State*.[6] The North Carolina Supreme Court, reversing the court of appeals, held that the North Carolina compulsory education statutes[7] permit parents to teach their children at home.[8] The *Delconte* court did not decide whether home instruction is protected by either the United States or North Carolina Constitutions.[9] This Note examines the *Delconte* holding in view of current state statutes, and after briefly reviewing the federal constitutional law applicable to home education, suggests that the right of parents to teach their children at home is guaranteed by the North Carolina Constitution.

Larry Delconte and his wife Michelle moved from New York State to Harnett County, North Carolina with their four children in March 1981.[10] They had begun to teach their two school-age children at home in New York with the permission of the local board of education.[11] After moving to North Carolina, Delconte wrote to the State Coordinator of the Office of Nonpublic Education, enclosing the information required and seeking approval of his school as a nonpublic school in accordance with North Carolina General Statutes section 115C-560.[12] The state coordinator, relying on two opinions of the North Carolina Attorney General finding that home education was not a satisfactory method of compliance with the North Carolina compulsory education laws,[13] refused to

---

5. Devins, *supra* note 1, at 438; *see also* S. ARONS, COMPELLING BELIEF 75-134 (1983) (discussing parental dissatisfaction with the academic and social environment of public schools).

6. 313 N.C. 384, 329 S.E.2d 636 (1985).

7. N.C. GEN. STAT. §§ 115C-378, 115C-547 to -562 (1983). For a discussion of these statutes, see *infra* text accompanying notes 105-24.

8. *Delconte*, 313 N.C. at 400, 329 S.E.2d at 646.

9. *Delconte*, 313 N.C. at 402, 329 S.E.2d at 647. In Duro v. District Attorney, 712 F.2d 96, 98 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984), the United States Court of Appeals for the Fourth Circuit held that neither the United States Constitution nor the North Carolina compulsory education statutes give parents the right to teach their children at home. This decision precluded the North Carolina Supreme Court from finding that the federal Constitution guarantees parents the right to instruct their children at home in lieu of public school attendance. After the *Duro* decision, one commentator predicted:

> In light of the United States Supreme Court's denial of certiorari in *Duro*, it is unlikely that the North Carolina Supreme Court would upset the Fourth Circuit's ruling on the religious liberty issue in *Duro*. Consequently, if parents are to prevail in *Delconte*, it seems likely that they will prevail on statutory grounds .... At the same time, such a decision would not serve as a precedent in favor of a parent's constitutional right to teach his child at home.

Devins, *supra* note 1, at 460. For criticism of the rationale of *Duro* see Note, *Compulsory Education: Weak Justifications in the Aftermath of* Wisconsin v. Yoder, 62 N.C.L. REV. 1167, 1171-72 (1984); *see also infra* notes 136-48 and accompanying text (brief discussion of *Duro*).

10. *Delconte*, 313 N.C. at 386, 329 S.E.2d at 638.

11. *Id.*

12. *Id.* N.C. GEN. STAT. § 115C-560 (1983) provides: "Any new school to which this part relates shall send to a duly authorized representative of the State of North Carolina a notice of intent to operate, name and address of the school, and name of the school's owner and chief administrator."

13. 49 N.C. Att'y Gen. 8 (August 9, 1979) (home instruction not permitted under current compulsory education statutes); *see also* 40 N.C. Att'y Gen. 211 (July 3, 1969) (home instruction did not satisfy compulsory education requirements under Act of May 26, 1955, ch. 1372, art. 20, § 1, 1955 N.C. Sess. Laws 1600, 1600, *repealed by* Act of May 20, 1981, ch. 423, § 1, 1981 N.C. Sess.

acknowledge plaintiff's Hallelujah School as a "qualified nonpublic school."[14] Delconte continued to educate his children at home and was prosecuted for violation of the compulsory school attendance law.[15] The state voluntarily dismissed these charges,[16] and plaintiff sought a declaratory judgment that "his home instruction was not prohibited by [the compulsory education] statutes . . . and, if it was, then these statutes contravened certain freedoms guaranteed to him by the state and federal constitutions."[17]

The Delcontes set aside a room in their home with a blackboard and desk to be used as a classroom.[18] They used "books and materials obtained from sources in New York and the Wake Christian Academy"[19] for their instruction, and the daily routine of the children included chores, playtime, and bible study in addition to academic work.[20] Delconte was a graduate of the United States Merchant Marine Academy and had done substitute teaching in New York; Mrs. Delconte had finished high school and one year of college and did not work outside the home.[21] The Delcontes instructed their children in basic reading, writing, and mathematics during the entire year.[22] Standardized test scores showed that the children were "achieving at average or better than average rates academically."[23]

Delconte expressed both religious and "sociopsychological" objections to

---

Laws 510, 510 (formerly codified at N.C. GEN. STAT. §§ 115-166 to-257 (1978)). For a discussion of the significance of these opinions in the *Delconte* case, see *infra* note 153.

14. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639. *See* N.C. GEN. STAT. §§ 115C-547 to -562 (1983) (concerning deregulated nonpublic schools, discussed *infra* text accompanying notes 105-24).

15. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639. N.C. GEN. STAT. § 115C-378 (1983) requires compulsory school attendance by children aged seven to sixteen.

16. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639.

17. *Id.* at 386, 329 S.E.2d at 638. Plaintiff also alleged that he was a representative member of a class of fundamentalist Christians "who have as their primary purpose the day to day education of their children in accordance with Fundamentalist Christian principles, as required by the Holy Bible." Record at 3, *Delconte*.

18. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639.

19. *Id.*

20. *Id.* At trial, plaintiff testified that "[o]ur children do get out into the community and visit in the community. They do play with neighborhood kids and do go to local grocery stores." Record at 42-43, *Delconte*.

21. *Delconte*, 313 N.C. at 386, 329 S.E.2d at 638. Plaintiff correctly asserted that he "would be qualified to teach in a nonpublic school in North Carolina." Record at 4, *Delconte*. Mrs. Delconte also would be qualified to teach in a nonpublic school in North Carolina, because N.C. GEN. STAT. § 115C-562 (1983) requires neither a teaching certificate nor a college degree for private school instructors. According to his testimony at trial, Delconte had previously been the director of a home for homeless men, had worked in orphanages, mental hospitals and psychiatric centers, and had "worked with retarded children and worked as a group parent with retarded and emotionally disturbed children." Record at 35, *Delconte*. Mrs. Delconte had had some experience working in a nursery school. *Id.* Although Delconte asserted that "[t]he teaching of the children is done by both Mr. and Mrs. Delconte under the supervision of Mr. Delconte," *id.* at 4, the North Carolina School Boards Association's Brief implied that the Delcontes' home was an inferior educational facility because Mr. Delconte worked outside the home and Mrs. Delconte's duties included taking care of her two youngest children and "washing, ironing, cooking and cleaning, and taking care of the animals." Amicus Curiae Brief [North Carolina School Boards Association] at 15, *Delconte* (quoting Record at 40, *Delconte*).

22. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639.

23. *Id.* Delconte's daughter's scores were "99th percentile in reading, 34th in math, 84th in language and 84th in basic," *id.* at 387 n.4, 329 S.E.2d at 639 n.4; his son "tested in grade 2, measured at grade 4 in reading. His overall range was in the upper quartile." *Id.*

public schooling.[24] He objected to some aspects of the public school curriculum, including the teaching of evolution, on religious grounds.[25] His sociopsychological objections were based on his belief that children should not be sent away to school "until 'they can [have] more of an effect on their environment than their environment [can have] on them.' "[26] At trial, Delconte testified that he had not enrolled his children in a local Christian school because he could not afford it, and because he believed that the family's home school was yielding fine academic results and that home study was better than classroom education for a child's overall personal development.[27] Delconte also noted his disagreement with certain doctrinal teachings of the local Christian school and his opposition to the administration of corporal punishment by teachers.[28]

The trial court ruled in favor of Delconte, concluding that his home school "was entitled to recognition as a qualified nonpublic school"[29] under the com-

---

24. *Id.* at 387, 329 S.E.2d at 639.

25. *Id.* For the exposition of a basis from which a Christian might reasonably conclude that the Bible mandates home instruction of children by their parents, see Amicus Curiae Brief [The Christian Legal Society] at 14-16, *Delconte*. At trial, Delconte also objected to the lack of religious requirements for employment as a teacher in a public school and negatively assessed the moral values of the teachers to whom his children were to be assigned. Record at 40, *Delconte*.

The supreme court quoted this passage of Delconte's testimony:

> "It is accurate to say that my decision to teach my children in my home was a twofold decision; that there were two reasons underlying that decision. One reason I would describe as a sociopsychological, common sense reason. The other reason is religious in nature. It is a tough question for me to answer as to which of these reasons is more important. Of course, I put Jesus Christ above anything. However, either reason alone would be enough for me to want to teach my kids in the home. I can't answer the question of whether I would send my children to public or private schools if my sociopsychological objections for schooling outside the home changed. I have never had to consider that question. It is a decision that would take a lot of deep thought. It would take an exceptional child of 12 years old, I think, to be able to stand in the Christian principles that Christ has dictated to us with all these adult figures around him that are giving him a different view. I think it would be better for my children to stay home, but if and when my children are to the point that they can be more of an effect on their environment than their environment on them, I would not want them to go, but if they wanted to go and they wanted to use it as a field of witness for Christ, praise the Lord, let them go."

Delconte, 313 N.C. at 388, 329 S.E.2d at 639-40.

Some of Delconte's sociopsychological objections to institutional education, such as his belief that "sending children from the home at an early age signifies to them rejection by their parents," *id.*, are not patently religious. Delconte's putting "Jesus Christ above anything," however, arguably indicates that his objections to public school education were predominantly based on religion. To the extent that Delconte's sociopsychological objections dealt with the values imparted by public schools, they probably were religious. For example, at trial Delconte testified:

> The values that we teach are also the values that our children are taught at home so there is no confusion in a child's mind when one thing is taught at home and one thing is taught at school. . . . [I]t doesn't make sense to send a child to an institution to learn values that are in direct opposition to the values that are being taught in the home.

Record at 37, *Delconte*.

26. *Delconte*, 313 N.C. at 388, 329 S.E.2d at 640.

27. Record at 42, *Delconte*.

28. *Id.* Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd mem.*, 423 U.S. 907 (1975), recognized the legitimacy of a state's *parens patriae* power in administering corporal punishment in public schools, holding that "parental control over child-rearing" is not a fundamental constitutional right. *Id.* at 299. In Ingraham v. Wright, 430 U.S. 651 (1977), the Supreme Court approved the use of corporal punishment in public schools without addressing the question whether control over childrearing constitutes a fundamental right of parents.

29. *Delconte*, 313 N.C. at 388, 329 S.E.2d at 640.

pulsory attendance statutes.[30] The trial court further held that if the North Carolina compulsory education statutes did not permit home instruction, then plaintiff's religious freedoms under the free exercise clause of the first amendment[31] and under the conscience clause of the North Carolina Constitution[32] would be violated.[33]

The court of appeals reversed the trial court's decision,[34] concluding that Delconte's home instruction did not constitute a qualified nonpublic school within the meaning of the compulsory education statutes.[35] The court also held that the prohibition of home instruction as a means of satisfying the compulsory education requirement did not violate Delconte's constitutionally protected religious freedom[36] because the state's interest in supervising education allowed it to make this policy decision.[37]

The North Carolina Supreme Court reversed the court of appeals.[38] The court first noted that the North Carolina compulsory attendance law[39] requires children between the ages of seven and sixteen to attend public schools or schools with teachers and curricula approved by the State Board of Education.[40] The legislature, however, also provided that certain enumerated requirements for "private church schools or schools of religious charter"[41] or for "qualified nonpublic schools"[42] were exclusive of all others.[43] In determining whether the general assembly intended to prohibit home instruction by allowing only institutional settings to qualify as schools, the court reviewed the history of compul-

30. N.C. GEN. STAT. §§ 115C-555 to -562 (1983). The trial court also held that Delconte's home school qualified as a "school of religious charter" under N.C. GEN. STAT. §§ 115C-547 to -554 (1983). Record at 53, *Delconte*. For a summary and discussion of these statutes, see *infra* text accompanying notes 105-24 (statutory framework), and 154-60 (statutes relating to religious schools).

The *Delconte* trial court held that the exclusivity provisions of N.C. GEN. STAT. §§ 115C-554, -562 (1983), which preclude the application of standards other than those specifically enumerated to private schools, were in direct conflict with the approval requirement in the basic compulsory education law. Record at 53, *Delconte*. Because criminal penalties resulted from failure to meet the approval requirement, the trial court held that this provision had to yield to the exclusivity provision for religious and qualified nonpublic schools. *Id.* This interpretation of the exclusivity provisions obviously was correct only if Delconte's house instruction constitutes a "school" within the meaning of the deregulation statutes.

31. U.S. CONST. amend. I.

32. N.C. CONST. art. I, § 13.

33. *Delconte*, 313 N.C. at 388, 329 S.E.2d at 640.

34. Delconte v. State, 65 N.C. App. 262, 269, 308 S.E.2d 898, 904 (1983), *rev'd*, 313 N.C. 384, 329 S.E.2d 636 (1985).

35. *Id.*; *see* N.C. GEN. STAT. §§ 115C-555 to -562 (1983). The court of appeals also ruled that Delconte's home school did not qualify as a private church school or school of religious charter under N.C. GEN. STAT. §§ 115C-547 to -554 (1983). *Delconte*, 65 N.C. App. at 266, 308 S.E.2d at 902. *See infra* text accompanying notes 105-24 for a discussion of these statutes.

36. *Delconte*, 65 N.C. App. at 269, 308 S.E.2d at 904.

37. *Id.*

38. *Delconte*, 313 N.C. at 403, 329 S.E.2d at 648.

39. N.C. GEN. STAT. § 115C-378 (1983).

40. *Delconte*, 313 N.C. at 389, 329 S.E.2d at 640.

41. N.C. GEN. STAT. §§ 115C-547 to -554 (1983).

42. *Id.* §§ 116C-555 to -562.

43. *Id.* § 115C-554 (enumerated requirements are the only provisions applicable to private church schools or schools of religious charter); *id.* § 115C-562 (same exclusivity of requirements for qualified nonpublic schools).

sory education legislation in North Carolina.[44] Focusing particularly on the 1979 legislation that deregulated private schools,[45] the court found that there was no legislative intent to define the term "school," but only to prescribe certain minimum regulations to govern all nonpublic schools.[46] The court noted:

> [T]he evident purpose of these recent statutes is to loosen, rather than tighten, the standards for nonpublic education in North Carolina. It would be anomalous to hold that these recent statutes were designed to prohibit home instruction when the legislature obviously intended them to make it easier, not harder, for children to be educated in nonpublic school settings.[47]

The court concluded that there were

> four ways by which school-aged children in this state may comply with our school attendance statutes. First, under N.C.G.S. Section 115C-378, a child may attend public school. Second, under this same section, a child may attend an "approved," "nonpublic school" which maintains the required records and conducts its curriculum concurrently with the local public school. Third, a child may attend a "private church school or school of religious charter" which meets the requirements of Part 2, Article 39, Chapter 115C. Fourth, a child may attend a "nonpublic school" which "qualifies" by meeting the requirements of Part 2, Article 39, Chapter 115C.[48]

The supreme court held Delconte's home instruction qualified as a nonpublic school because it received no funding from the State of North Carolina.[49]

---

44. *Delconte*, 313 N.C. at 397-400, 329 S.E.2d at 645-46.

45. N.C. GEN. STAT. §§ 115C-547 to -562 (1983).

46. *Delconte*, 313 N.C. at 400, 329 S.E.2d at 646.

47. *Id.*

48. *Id.* at 390, 329 S.E.2d at 640-41. The court's second method for satisfying the compulsory education requirement is that a child attend an "approved" nonpublic school. This method apparently reflects the requirements of N.C. GEN. STAT. § 115C-378 (1983) that a private school have "teachers and curricula that are approved by the State Board of Education." Perhaps under this second method the approval requirements are replaced by the more minimal requirements for qualified nonpublic schools in N.C. GEN STAT. §§ 115C-555 to -562. As a practical matter, however, parents would seek certification of private school alternatives through the deregulatory legislation, rather than seeking "approval" from the State Board of Education.

49. *Delconte*, 313 N.C. at 391, 329 S.E.2d at 641. The court of appeals relied upon the maxim *ejusdem generis* in interpreting the provisions of N.C. GEN. STAT. § 115C-555 (1983), quoted *infra* text accompanying note 124. Under this canon of statutory construction, "where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations as including only things of the same kind, character and nature as those specifically enumerated." State v. Fenner, 263 N.C. 694, 697, 140 S.E.2d 349, 352 (1965). Because the first three criteria for qualification under the statute involve accreditation by or membership in organizations of institutional schools, the court of appeals held that the fourth criterion for qualification applied to institutional schools as well. *Delconte*, 65 N.C. App. at 266-67, 308 S.E.2d at 902-03. Thus, under the reasoning of the court of appeals, the mere fact the Delcontes received no state funding did not qualify their program of instruction as a nonpublic school. *Id.*

In response to the analysis of the court of appeals, the supreme court observed:

> Subsection (4) is as specific a requirement as those contained in subsections (1), (2), and (3). Each of the subsections is equally specific, discrete, and stands on its own footing. The statute clearly requires that only one of the "characteristics" be present. Delconte's home instruction meets the characteristic set out in subsection (4), *i.e.*, it receives no state funding.

The court stated, "We do not agree that the legislature intended simply by use of the word 'school,' because of some intrinsic meaning invariably attached to the word, to preclude home instruction."[50] In light of its determination that the Delcontes could educate their children at home in compliance with the compulsory education statute, the court merely noted some of the constitutional issues involved[51] without resolving them.[52] The court recognized, however, that if the state prohibited home instruction altogether "serious constitutional questions would arise,"[53] because of the possible infringement of religious freedoms.

The United States Supreme Court has never decided whether a state may constitutionally prohibit home instruction altogether.[54] The Court, however, has made broad statements concerning society's interest in education[55] and has recognized that states have a *parens patriae* interest in the education of their children.[56] Consequently, states may reasonably regulate all forms of education

---

Delconte, 313 N.C. at 391, 329 S.E.2d at 641. For other interpretations of statutory construction rules that could be argued against the supreme court's holding, see *infra* note 153.

50. *Delconte*, 313 N.C. at 392, 329 S.E.2d at 642. Because there were no North Carolina cases interpreting the term "school," the court of appeals relied on cases from other jurisdictions for the proposition that home instruction is not a form of school. *Delconte*, 65 N.C. App. at 266, 308 S.E.2d at 907 (citing *In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); F & F v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967); State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963); City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).

The supreme court distinguished all of these cases on the ground that they had interpreted statutes with provisions concerning education that were more express than the North Carolina compulsory education statutes. In this connection, the court quoted a Washington decision holding that " '[t]he three essential elements of a school are (1) the teacher, (2) the pupil *or* pupils, and (3) the place *or* institution.' " *Delconte*, 313 N.C. at 394, 329 S.E.2d at 643 (quoting State v. Superior Court, 55 Wash. 2d 177, 182, 346 P.2d 999, 1002 (1959), *cert. denied*, 363 U.S. 814 (1960)) (emphasis added).

The court also noted two state cases specifically permitting home instruction as a type of private school. *Delconte*, 313 N.C. at 395-96, 329 S.E.2d at 643-44 (citing People v. Levisen, 404 Ill. 574, 50 N.E.2d 313 (1950); State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904)). From its review of the relevant cases, the court concluded:

> In summary, our sister jurisdictions, when faced with the question of whether home instruction is prohibited by school attendance statutes which specify various standards for nonpublic schools, have almost always analyzed the question not in terms of any meaning intrinsic to the word "school" but rather in terms of whether the particular home instruction in question met the statutory standards. In the absence of a clear legislative prohibition of home instruction, we think this is the better approach to the problem.

Delconte, 313 N.C. at 397, 329 S.E.2d at 644-45.

51. *Delconte*, 313 N.C. at 400-403, 329 S.E.2d at 646-48.

52. *Id.* at 402, 329 S.E.2d at 647.

53. *Id.* at 400, 329 S.E.2d at 646.

54. The constitutionality of compulsory education laws in general is beyond question. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 240 (1977); Prince v. Massachusetts, 321 U.S. 158, 166 (1943); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

55. *Accord* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (recognizing "the importance of education to our democratic society"); Wisconsin v. Yoder, 406 U.S. 205, 213, 221 (1972); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society," and when children are not educated, "significant social costs [are] borne by our Nation.").

56. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("education prepares individuals to be self-reliant and self-sufficient participants in society"); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the state's constitutional power to regulate.").

for minors, including private education.[57] A state may not make public education the only means of satisfying its compulsory education requirement,[58] but it is not clear whether a state may require that private education be conducted in an institutional setting. Specific state regulation of private education[59] may be challenged as violating the free exercise clause of the first amendment[60] or the due process of law clause of the fourteenth amendment.[61]

Three Supreme Court cases in the 1920s involved challenges to state regulation of education on due process grounds. The Court held for the parents in each case, and each decision contains broad language that might be construed to protect the right of parents to teach their children in the home. The first case, *Meyer v. Nebraska*,[62] overturned the conviction of a private tutor for teaching German to elementary school students in violation of a state statute.[63] The Court opined that the goals of "Americanization" that the statute sought to implement rested on "ideas touching the relationship between individual and State [that are] wholly different from those upon which our [governmental] institutions rest."[64]

In the second case, *Pierce v. Society of Sisters*,[65] the Court held that states may not prohibit all forms of private education.[66] The Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[67]

In the third case, *Farrington v. Tokushige*,[68] the Court dealt with a statute governing schools conducted in foreign languages,[69] which were established by

57. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 178 (1976) (asserting that a state may reasonably regulate private education in a case in which racial discrimination by private schools was held unlawful); *see also* Note, *The State and Sectarian Education: Regulations to Deregulation*, 1980 DUKE L.J. 801, 811-12 n.59 (discussing other cases upholding states' power to regulate education to achieve an informed citizenry).

58. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating Oregon statute requiring all children to attend public schools but holding that private education may be reasonably regulated).

59. For state statutes allowing and regulating home education, see Note, *supra* note 2, at 364 nn.53-54. For discussions of the regulation of home study programs, see Lines, *supra* note 1, at 194-97; Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1, 51-2 (1982); *see also* Devins, *State Regulation*, *supra* note 3 (discussing regulation of private institutional schools).

60. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."). This guarantee of religious freedom was declared binding upon the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

61. U.S. CONST. amend. XIV. Challenges to the unconstitutional vagueness of statutes requiring children to attend "school" have not been very successful. *See* Lines, *supra* note 1, at 211 n.116.

In *In re* Gregory B., 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976), a minor claimed that he was not being educated in public schools, raising noneducation as a defense in a truancy proceeding; the court concluded he would be better served in an inferior school than in no school at all. *Id.* at 318, 387 N.Y.S.2d at 384.

62. 262 U.S. 390 (1923).

63. *Id.* at 400.

64. *Id.* at 402.

65. 268 U.S. 510 (1925).

66. *Id.* at 535.

67. *Id.*

68. 273 U.S. 284 (1927).

69. *Id.* at 291.

Japanese parents in Hawaii.[70] Finding that the legislation gave "affirmative direction concerning the intimate and essential details of such schools . . . and [denied] . . . reasonable choice and discretion in respect of teachers, curriculum and textbooks,"[71] and that it would probably destroy most foreign language schools,[72] the Court held that the legislation violated the fundamental rights of the individual under the fifth amendment's due process clause.[73] The Court also noted that the legislation was "[a]pparently . . . a deliberate plan to bring foreign language schools under a strict governmental control for . . . no adequate reason."[74]

More recent decisions of the Supreme Court concerning the right of privacy[75] recognize some parental rights in child rearing.[76] One commentator, however, believes that "[t]he right of parental control has only questionable significance to future challenges to state regulations"[77] and suggests that most contemporary state regulations promote a legitimate state interest.[78] Noting that the regulation in *Meyer* was not related to a legitimate state interest[79] and that statutes in *Pierce* and *Farrington* effectively foreclosed the private school option,[80] this commentator observes that "the judiciary in the early twentieth century was extremely protective of individual rights that seemed threatened by any form of governmental action."[81]

Challenges to state regulation of private education also may be based on the free exercise clause of the first amendment. When an individual claims that his or her constitutional right to free exercise of religion has been violated, a court is required to determine (1) whether a sincere religious belief is infringed by enforcement of the statute, and (2) if so, whether the state's interest in the statute is of "sufficient magnitude to override the interest claiming protection under the

---

70. *Id.* at 290-91.

71. *Id.* at 298.

72. *Id.*

73. *Id.* at 298-99.

74. *Id.* at 298.

75. *See* Stocklin-Enright, *supra* note 4, at 566-68 (right of privacy is virtually identical to the right to substantive due process).

76. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (The right to privacy "has some extension to activities relating to marriage, . . . child rearing and education."); Doe v. Bolton, 410 U.S. 179, 211-212 (1973) (Douglas, J., concurring) (listing "education and upbringing of children" as a fundamental right in which one has freedom of choice). Justice Douglas, however, was the sole dissenter in Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the court concluded that Amish parents had a right to remove their children from public schools after the eighth grade to protect their free exercise of religion. *See infra* notes 83-89 and accompanying text.

77. Devins, *supra* note 1, at 455.

78. Devins, *supra* note 1, at 455.

79. Devins, *supra* note 1, at 455.

80. Devins, *supra* note 1, at 455. Devins also notes that although the Supreme Court has never explicitly drawn the line separating reasonable from unreasonable regulation, language in Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968), could be read to allow states to preclude home instruction and require certification of teachers in private schools. He asserts that "[states have the power to] insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, [must] be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Id.* at 455-56.

81. Devins, *supra* note 1, at 455 (discussing LAW AND PUBLIC EDUCATION 32 (S. Goldstein & E. Gee ed. 1980)).

Free Exercise clause."[82]

In *Wisconsin v. Yoder*[83] the Supreme Court, although recognizing the legitimacy of a state's interest in mandating compulsory education, exempted Amish children from compulsory high school attendance.[84] In granting the free exercise claim of the Amish, the Court emphasized that the children to be exempted were already near the age at which they could legally leave school.[85] The Court also noted that the parents had a heightened interest in governing their children's education because of the impact that the school environment would have on the children's decisions whether to remain in the Amish community.[86] The Court suggested that it would not have permitted the removal of the children if they had seemed likely to leave the Amish community anyway[87] or had been too young to have acquired rudimentary academic skills.[88] Further, the Court intimated that the right to remove children from school does not extend to parents motivated by nonreligious reasons.[89] Although *Yoder* recognized the right of parents to direct the upbringing of their children,[90] the decision "contains too much language about the general authority of the state in education to be con-

82. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also* United States v. Seeger, 380 U.S. 163, 185 (1965) (In a conscientious objector case, "the 'truth' of a belief is not open to question, [but] there remains the significant question whether it is 'truly held' "; the test is whether beliefs are sincerely held and whether they are, to the objector, "religious.").

83. 406 U.S. 205 (1972).

84. *Id.* at 234.

85. *Id.* at 223-25.

86. *Id.* at 215-18. The majority paid scant attention to evidence that a significant number of Amish children leave the old order. *Id.* at 245 (Douglas, J., dissenting). For a discussion of the notion that parents are the caretakers of their children's rights, see Burt, *Developing Constitutional Rights of, in and for Children*, 39 LAW & CONTEMP. PROB. 118, 123 (1975); Devins, *supra* note 1, at 451-52 nn.102-06, 108. For a summary of decisions limiting the requirement of parental consent for medical treatment, abortion, and birth control, see *id.* at 452 n.106.

87. *Yoder*, 406 U.S. at 215-17.

88. *Id.* at 225.

89. The Court observed:

> [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary similar values accepted by the majority . . . their claims would not rest on a religious basis . . . [nor] rise to the demands of the religious clauses.

Id. at 215-16; *see also* authorities cited in Note, *supra* note 9, at 1169 n.24 (discussing *Yoder*'s limited precedential value). For criticism that *Yoder* failed to address the children's rights issue adequately, see Knudsen, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506 (1974); Note, *Constitutional Law—First Amendment—The Balancing Process for Free Exercise Needs a New Scale*, 51 N.C.L. REV. 302 (1972); Note, *Adjudicating What* Yoder *Left Unresolved: Religious Rights for Minor Children after* Danforth *and* Carey, 126 U. PA. L. REV. 1135 (1978); *see also* Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1388-89 (1974) (suggesting that a "strict scrutiny" standard of constitutional review should be applied when parents challenge state intrusion into family affairs based on a state's "collective" interests, but that a less exacting standard should be used when the state intrudes primarily to aid the child personally). The *Yoder* Court's emphasis on religious liberty issues to the detriment of due process claims is criticized in Boothby, *Government Entanglement with Religion: What Degree of Proof is Required?*, 7 PEPPERDINE L. REV. 613 (1980) and in Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 215 (1973).

For a discussion of *Yoder* and subsequent judicial limitation of its doctrine, see Lines, *supra* note 1, at 200-06. For a collection of commentary on *Yoder*, see Note, *supra* note 9, at 1169 n.24. For a collection of Supreme Court cases on free exercise, see *id.* at 1167 n.2.

90. Devins, *supra* note 1, at 451-52.

sidered a strong precedent in favor of nonreligious claims."[91] Under the rationale of *Yoder*, the Court might accept an argument that compulsory education outside the home unconstitutionally impedes the exercise of a true religious belief.[92] Even a claim based on religious belief, however, will not overcome the *parens patriae* interest of the state "if it appears that parental decisions will jeopardize the health or safety of the child."[93]

Thirty-four states permit some form of home instruction to satisfy compulsory education requirements.[94] Two extremes in state regulation of home instruction can be seen in the statutes of Louisiana and Michigan.[95] Louisiana merely requires that parents furnish their proposed home study programs to the State Board of Education and have their children take standardized tests at the end of each school year.[96] Michigan, on the other hand, requires that home instructors be certified, thus effectively excluding most parents as teachers,[97] and provides also that home instruction must be comparable to that provided in public schools.[98]

Many courts, like the *Delconte* court, have avoided deciding the constitutionality of prohibiting home instruction by holding that a home is a school for purposes of statutory compulsory educational requirements.[99] In other cases,

---

91. Devins, *supra* note 1, at 453.

92. The Court noted:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause . . . and thus beyond the power of the State to control, even under regulations of general applicability.

Yoder, 406 U.S. at 220 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

93. Devins, *supra* note 1, at 233-34. For constitutional arguments in favor of home education, see Brief of Amici Curiae in Support of Appellant [The Rutherford Institute] at 1-54, *Delconte*; Stocklin-Enright, *supra* note 4; Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 786 (1975); Note, *supra* note 1.

For further discussions of the constitutional issues involved in compulsory education legislation, see Devins, *supra* note 1, at 453 n.107 (discussing the significance of Supreme Court cases upholding various constitutional claims by schoolchildren); Lines, *supra* note 1, at 209-12 (discussing constitutional challenges to compulsory education laws); *id.* at 198 n.41 (citing cases challenging compulsory education laws on constitutional grounds); *id.* at 195-95 n.21 (citing state cases allowing the state to regulate private educational alternatives); *id.* at 214-17 (discussing cases on the permissible scope of state regulation of private schools); Stocklin-Enright, *supra* note 4, at 589-602 (discussing the constitutionality of five state statutes in particular); Note, *supra* note 2, at 369-70 (discussing state cases in which it was argued that home education was a constitutional right); Note, *supra* note 1, at 198-202 (discussing Supreme Court cases on education).

94. Tobak & Zirkel, *supra* note 59, at 12. For compendiums of state compulsory attendance laws, see Lines, *supra* note 1, at 220-34, 195 nn.24-26, 196 nn.29-33, 197 nn.34-37; Note, *supra* note 2, at 379-81. For a discussion of state statutes allowing home education and regulating it to various degrees, see Tobak & Zirkel, *supra* note 59. For other discussions of compulsory attendance statutes see Stocklin-Enright, *supra* note 4, at 603-10 (discussing various features of state regulation with extensive citations to statutes); Note, *supra* note 1, at 194-98.

95. Devins, *supra* note 1, at 442.

96. LA. REV. STAT. ANN. § 17:236 (West 1982).

97. Devins, *supra* note 1, at 443.

98. Mich. Att'y Gen. Op. No. 5579, Sept. 27, 1979 (interpreting MICH. COMP. LAWS § 380.1561 (1979)). For an analysis of various state statutes that permit "equivalent" or "comparable" instruction in lieu of public school attendance, see Tobak & Zirkel, *supra* note 59, at 6-10; *see also infra* note 163 (concerning evidence on the merit of home instruction and the burden of proof under equivalency statutes).

99. *See, e.g.*, Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); People v.

private schools, including teacher certification, over the religious liberty objections of school officials.[107] In response the general assembly passed legislation[108] that effectively deregulated private schools.[109] In the opinion of the Attorney General of North Carolina, however, this new legislation did not allow parents to educate their children at home as a means of satisfying the compulsory education requirement.[110]

> The deregulatory legislation[111] begins with a statement of its policy:
>
> In conformity with the constitutions of the United States and of North Carolina, it is the public policy of the State in matters of education that "No human authority shall, in any case whatever, control or interfere with the rights of conscience," or with religious liberty and that "religion, morality, and knowledge being necessary to good government and the happiness of mankind . . . the means of education shall forever be encouraged."[112]

This first part of the legislation deals with "private church schools and schools of religious charter." Such schools are required to maintain immunization records, operate for nine calendar months of the year, excluding vacations and holidays, and be subject to "reasonable fire, health and safety inspections . . . as required by law."[113] They must administer standardized achievement tests periodically and maintain test records for annual inspection.[114] In addition, schools to which the statute applies must administer a high school competency test to eleventh graders after establishing some minimum passing score on the exam as a graduation requirement.[115] Private church schools or schools of religious charter may voluntarily participate in programs operated or sponsored by the state, including the administration of testing.[116] The statute also requires that schools subject to the regulation give notice of operation and termination of operation[117] and creates a position for an officer to receive such reports.[118] The legislation explicitly exempts religious schools from the application of any other

107. State v. Columbus Christian Academy, No. 78 CVS 1678 (N.C. Super. Ct. Wake County, Sept. 1, 1978), *vacated as moot and dismissed*, N.C. May 4, 1979 (see Plaintiff Appellee's Brief (Exhibit A), Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1985)). For an interesting account of their legal battles by some of the defendants in this class action suit against 11 North Carolina Christian schools and a statement of their grievances, see K. KELLY, STATE OF NORTH CAROLINA VS. CHRISTIAN LIBERTY (n.d.) (available in the library of the School of Law, University of North Carolina at Chapel Hill).

108. N.C. GEN. STAT. § 115C-547 to -562 (1983).

109. *See* Note, *supra* note 57, at 802-03. For an overview of the history of North Carolina compulsory education legislation, see *Delconte*, 313 N.C. at 397-400, 329 S.E.2d at 645-46.

110. 49 N.C. Att'y Gen. 8 (August 9, 1979). An earlier opinion, 40 N.C. Att'y Gen. 211 (July 3, 1969), averred that home instruction did not satisfy the requirement under former previous North Carolina compulsory education laws.

111. N.C. GEN. STAT. §§ 115C-547 to -554 (1983).

112. *Id.* § 115C-547 (quoting N.C. CONST. art. I, § 13, article IX, § 1).

113. *Id.* § 115C-548.

114. *Id.* § 115C-549.

115. *Id.* § 115C-550.

116. *Id.* § 115C-551.

117. *Id.* § 115C-552.

118. *Id.* § 115C-553.

the parties failed to present the constitutional issue to the courts, especially when "secondary issues involving the permissibility of expansive state regulation"[100] were involved. Several courts have intimated that no constitutional right to home instruction exists.[101] Others have recognized that the right to home education may be protected by either the free exercise clause[102] or the due process clause.[103] States that permit home study unequivocally claim the authority to regulate it.[104]

The North Carolina compulsory education law requires children between the ages of seven and sixteen "to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session.[105] "School" is defined to include all public schools and such nonpublic schools that have teachers and curricula that are approved by the State Board of Education.[106]

In 1979 a North Carolina trial court upheld comprehensive regulation of

---

Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950); State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904).

Other courts have not accepted home instruction as equivalent to school instruction. *See* State v. Lowry, 191 Kan. 701, 703, 383 P.2d 962, 964 (1963); State v. Hoyt, 84 N.H. 38, 39, 146 A. 170, 170-71 (1929); State *ex rel.* Shoreline School Dist. No. 412 v. Superior Ct., 55 Wash. 2d 177, 346 P.2d 999 (1960), *cert. denied*, 363 U.S. 814 (1960); State v. Counort, 69 Wash. 361, 363, 124 P. 910, 911 (1912); State v. Riddle, 285 S.E.2d 359, 364 (W. Va. 1981). These cases are discussed in Devins, *supra* note 1, at 460-62 & 460 n.157, 461 n.158.

100. Devins, *supra* note 1, at 461; *see id.* at 459-61 nn.150-64 for some of these rulings.

101. *See* Hanson v. Cushman, 490 F. Supp. 109, 114 (W.D. Mich. 1980); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 461 (N.D. Ill. 1974); State v. Hoyt, 84 N.H. 38, 40, 146 A. 170, 171 (1929); State *ex rel.* Shoreline School Dist. No. 412 v. Superior Ct., 55 Wash. 2d 177, 346 P.2d 999, 1003 (1960), *cert. denied*, 363 U.S. 814 (1960).

102. *See, e.g.*, State v. LaBarge, 134 Vt. 276, 280, 357 A.2d 121, 124 (1976) (suggesting in dicta that first amendment concerns sometimes override the state's interest in compulsory education); *see also* State v. Nobel, No. 5791-0114-A, S-791-0115-A, slip op. at 8 (Mich. Dist. Ct. Allegan County Jan. 9, 1980) (finding no evidence of a compelling state interest in teacher certification laws that would override the religious liberty interests of parents). *But cf.* Devins, *supra* note 1, at 466-67 (discussion of home education cases rejecting free exercise claims).

The text of the opinion in State v. Nobel, No. 5791-0114-A, S-791-0115-A (Mich. Dist. Ct. Allegan County Jan. 9, 1980), is reprinted in Appendix of Amici Curiae in Support of Appellant [The Rutherford Institute] at 104, *Delconte*. This appendix also contains other recent unpublished trial court decisions concerning home education. *Id.* at 116-83. The text of the brief contains a comprehensive pro-home education analysis of many state home instruction cases. Brief of Amici Curiae in Support of Appellant at 59-70, *Delconte*.

103. *See, e.g.*, Peirce v. New Hampshire State Bd. of Educ., 122 N.H. 765, 768, 481 A.2d 363, 367-68 (1982) (Douglas and Brock, J.J., concurring); People v. Turner, 277 A.D.2d 317, 317-20, 98 N.Y.S.2d 886, 888 (N.Y. App. Div. 1980); *see also* Perchemlides v. Frizzle, No. 16641, slip op. at 9 (Mass. Super. Ct. Nov. 13, 1978) ("Nonreligious as well as religious parents have the right to choose from the full range of educational alternatives for their children."). For discussions of *Perchemlides*, see S. ARONS, *supra* note 5, at 75-134 (1983); Stocklin-Enright, *supra* note 4, at 598-599. The unpublished trial court decision in *Perchemlides* is reproduced in Brief of Amici Curiae in Support of Appellant [The Rutherford Institute] at 116, *Delconte*.

104. "Where the statute has an explicit exception and specific requirements for home study, courts have adamantly rejected the arguments of parents that home study qualifies as a private school. Similarly, courts have insisted upon compliance with the procedural prerequisites specified in the statute." Tobak & Zirkel, *supra* note 59, at 58.

For cases allowing home instruction, see Stocklin-Enright, *supra* note 4, at 609-10 n.152. For cases holding that a home does not qualify as a private school, see Note, *supra* note 2, at 365 nn.56-60.

105. N.C. GEN. STAT. § 115C-378 (1983).

106. *Id.*

requirements except those pertaining to basic safety.[119]

The second part of the statute relates to "qualified nonpublic schools."[120] It imposes the same requirements for qualified nonpublic schools as for private church schools or schools of religious charter[121] and provides that these requirements are exclusive.[122] Although this part of the deregulatory legislation contains no policy statement analogous to that prefacing the part relating to religious schools,[123] the statute defines a qualified nonpublic school as having

> one or more of the following characteristics:
>
> (1) It is accredited by the State Board of Education.
>
> (2) It is accredited by the Southern Association of Colleges and Schools.
>
> (3) It is an active member of the North Carolina Association of Independent Schools.
>
> (4) It receives no funding from the State of North Carolina.[124]

Prior to *Delconte* the North Carolina courts had never decided a case specifically concerning the permissibility of home education. In *In re McMillan*[125] the court of appeals upheld a finding that children were neglected because they did not attend school, but the court specifically noted that there was "no showing that [the children received] any mode of educational program alternative to those in the public school."[126] In *State v. Vietto*,[127] decided under the old compulsory education statute,[128] a mother removed her child from private school and placed her in a tutorial institution.[129] The North Carolina Supreme Court overturned the mother's conviction for violating the compulsory attendance law,[130] noting that there was a lack of competent evidence that the tutorial insti-

---

119. *Id.* § 115C-554.

120. *Id.* §§ 115C-555 to -562.

121. *Id.* §§ 115C-556 to -561.

122. *Id.* § 115C-562.

123. See *supra* text accompanying note 112 for the language of the policy statement concerning religious schools.

124. N.C. GEN. STAT. § 115C-555. For a criticism of this deregulatory approach to education, see Note, *supra* note 57, at 834-36 (arguing that state supervision through testing alone is inadequate).

125. 30 N.C. App. 235, 226 S.E.2d 693 (1976). In *McMillan* a parent refused to send his children to a public school that did not teach American Indian heritage and culture. Another case involving protest of education policy is State v. Chavis, 45 N.C. App. 438, 263 S.E.2d 356 (1980). In *Chavis* Indian parents refused to send their children to the public school to which they were assigned under Department of Health, Education and Welfare guidelines. The court of appeals upheld the parents' conviction for failing to send their children to the assigned school. *Id.* at 443, 263 S.E.2d at 360. For a brief discussion of *Chavis*, see Lines, *supra* note 1, at 207-08. In State v. Williams, 253 N.C. 377, 117 S.E.2d 444 (1960), the North Carolina Supreme Court held that the state may regulate business, trade, and correspondence schools provided such regulation is reasonable and not arbitrary.

126. *McMillan*, 30 N.C. App. at 238, 226 S.E.2d at 695.

127. 297 N.C. 8, 252 S.E.2d 732 (1979).

128. Act of May 26, 1955, ch. 1372, art. 20, § 1, 1955 N.C. Sess. Laws 1600, 1600, *repealed by* Act of May 20, 1981, Ch. 423, § 1, 1981 N.C. Sess. Laws 510, 510 (formerly codified at N.C. GEN. STAT. § 115-166 (1978)).

129. *Vietto*, 297 N.C. at 9-11, 252 S.E.2d at 733.

130. *Id.* at 13, 252 S.E.2d at 735.

tution was not approved by the State Board of Education.[131] Because neither *In re McMillan* nor *State v. Vietto* involved home education, these cases shed little light on the constitutionality of prohibiting home instruction.

Three provisions of the North Carolina Constitution are central to the home education debate. Article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[132] Article IX, section 1 provides that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."[133] Article IX, section 3 requires that "[t]he General Assembly shall provide that every child of appropriate age and of sufficient mental ability shall attend the public schools, unless educated by other means."[134] In considering the religious claims of the Delcontes to educate their children at home, North Carolina's "conscience clause" must also be analyzed. This clause provides that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, contend or interfere with the rights of conscience."[135]

In *Duro v. District Attorney*[136] the United States Court of Appeals for the Fourth Circuit decided a case involving facts very similar to those in *Delconte*. Plaintiff in *Duro*, who taught his five school-age children at home because of his religious opposition to the "unisex movement . . . and the promotion of secular humanism,"[137] argued that the North Carolina compulsory education law was unconstitutional as applied to him because it violated his religious freedom under the first and fourteenth amendments to the United States Constitution.[138] The district court, relying partially on *Wisconsin v. Yoder*,[139] held that because North Carolina had "so drastically undercut its asserted interest in the universality of education" by deregulating private schools, there was no compelling state interest in preventing a parent from educating his or her child at home.[140] The court of appeals,[141] however, reversed this ruling. That court distinguished *Yoder*[142] and held that North Carolina's interest in compulsory education, de-

131. *Id.* at 12-13, 252 S.E.2d at 735. A concurring opinion emphasized the lack of evidence of *willful* violations of the statute. *Id.* at 13, 252 S.E.2d at 735 (Huskins, J., concurring).

132. N.C. CONST. art. I, § 15.

133. *Id.* art. IX, § 1.

134. *Id.* art. IX, § 3.

135. *Id.* art. I, § 13.

136. 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

137. *Id.* at 97.

138. *Id.*

139. See *supra* notes 83-93 and accompanying text for a brief discussion of *Yoder*.

140. Duro v. District Attorney, No. 81-13-Civ. 2, slip op. at 6-7 (E.D.N.C. Aug. 20, 1982), *rev'd*, 712 F.2d 96 (4th Cir. 1983), *cert denied*, 465 U.S. 1006 (1984).

141. *Duro*, 712 F.2d at 99.

142. The court of appeals distinguished *Yoder* from *Duro* on two grounds. First, the Duros were not members of a long established religious community, as were the Amish parents in *Yoder*. Second, the Amish parents allowed their children to attend public school through the eighth grade, but the Duros refused to enroll their children in any institutional school. *Duro*, 712 F.2d at 98.

spite its substantial deregulation of private education, prevailed over Duro's interest in religious liberty.[143]

In ruling for the Delcontes the North Carolina trial court relied on the decision of the federal district court in *Duro*.[144] By the time *Delconte* reached the North Carolina Court of Appeals, the United States Court of Appeals for the Fourth Circuit had reversed the federal district court's decision in *Duro*.[145] Noting the decision of the court of appeals in *Duro*,[146] the North Carolina Court of Appeals held that even if Delconte had a protected religious belief that was infringed by the compulsory education statutes, the state retained an overriding interest in education and could preclude the home instruction option.[147] In view of the decision in *Duro*, it would have been highly irregular for the North Carolina Supreme Court to have ruled in *Delconte* that the United States Constitution guarantees parents the right to educate their children at home.[148]

The *Delconte* court's statutory interpretation was a reasonable reading of the "qualified nonpublic school" deregulation statute.[149] The court asserted that the general assembly probably did not intend to preclude the home instruction option.[150] It would be more accurate to say that the general assembly probably did not contemplate home instruction in enacting the legislation. The statute was a swift legislative reaction to the strictures placed on religious schools by *State v. Columbus Christian Academy*.[151] In enacting the legislation, the general assembly probably intended to preserve the existence of nonpublic schools like the Columbus Christian Academy.[152] The supreme court in *Delconte*, however, interpreted the legislation as intended to loosen requirements on nonpublic education, concluding that it would be "anomalous" to hold that the statute was designed to prohibit home instruction.[153]

---

143. *Id.* at 99.

144. Record at 54, *Delconte*.

145. *See Duro*, 712 F.2d at 96.

146. *Delconte*, 65 N.C. App. at 264 n.1, 308 S.E.2d at 901 n.1.

147. *Id.* at 269, 308 S.E.2d at 904.

148. *See supra* note 9. Before the North Carolina Supreme Court, Delconte distinguished the *Duro* case from his own. Plaintiff-Appellant's New Brief at 6, *Delconte* ("[P]laintiff in the Duro case was seeking to have the North Carolina Compulsory School Attendance laws declared unconstitutional. The plaintiff-appellant herein [argues that he] complied with the . . . Attendance laws.").

149. N.C. GEN. STAT. §§ 115C-555 to -562 (1983).

150. *Delconte*, 313 N.C. at 402, 329 S.E.2d at 648.

151. No. 78 CVS 1678 (N.C. Super. Ct., Wake County, Sept. 1, 1978), *vacated as moot and dismissed*, N.C. May 4, 1979. *See* Plaintiff-Appellee's Brief (Exhibit A), *Delconte*, 65 N.C. App. 262, 308 S.E.2d 898 (1985). See *supra* notes 107-09 and accompanying text for a brief discussion of this case.

152. Telephone interview with Edd Nye, North Carolina State Representative for Bladen County (March 7, 1986) (In deliberations on the deregulatory statutes, home education was "not even discussed."); Devins, *supra* note 1, at 457-58 n.141; Note, *supra* note 57, at 802-03; *see also* K. KELLY, *supra* note 107 (discussing viewpoint of the defendant Christian School educators in *Columbus Christian Academy*); *supra* notes 107-09 and accompanying text (brief discussion of *Columbus Christian Academy*).

Because home schools existed in North Carolina in the 1960s and 1970s, long after the compulsory education laws were originally adopted, it could be argued that the legislature acquiesced in their existence. *See* Plaintiff-Appellant's New Brief at 13, *Delconte*. There was no case law at that time approving home education.

153. *Delconte*, 313 N.C. at 400, 329 S.E.2d at 646. Holding that a home education program

The supreme court in *Delconte* did not adopt the trial court's conclusion that Delconte's home qualified as a private church school or school of religious charter.[154] It can be argued, however, that Delconte's home instruction met the definition of "school" implied in the policy statement[155] concerning schools of

---

could not meet the statute's standards for qualification as a nonpublic school might also be anomalous. It could be argued, however, that a family home cannot qualify as a nonpublic school because the legislature intended that the only schools to be deregulated by virtue of receiving no state funding should be educational institutions. *See* N.C. GEN. STAT. § 115C-555 (1983).

There are at least three rules of statutory construction in addition to that of *ejusdem generis*, *supra* note 49, that can be advanced against the argument that home instruction constitutes a nonpublic school. The first is that courts should "look first to the ordinary meaning of the word[s]" used in a statute. State v. Ludlum, 303 N.C. 666, 671, 281 S.E.2d 159, 162 (1981). Because the standard definition of a school is a place of instruction, it might be argued that home instruction cannot constitute a school. *See* Amicus Curiae Brief [North Carolina School Boards Assn.] at 5, *Delconte*. The Delcontes, however, did have a place in their home, complete with a blackboard, desk, and books, where instruction was imparted. *Delconte*, 313 N.C. at 387, 329 S.E.2d at 639.

The second rule of statutory construction is that "ordinarily it is reasonable to presume the words used in one place in the statute have the same meaning in every other place in the statute." Campbell v. First Baptist Church, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). Schools are ordinarily thought of as buildings in which students gather to learn. Therefore, it could be argued that home instruction does not comprehend this ordinary meaning of the word school. Amicus Curiae Brief [North Carolina School Boards Assn.] at 5, *Delconte*. The ordinary meaning of a word, however, can include different forms within the same definition. For example, "a school of thought" is not a form of the ordinary definition of school. "Correspondence School," however, would be included in what one means when he or she speaks of a school, although it does not involve a building or students gathering to learn. Thus, "home schools," like "correspondence schools," are arguably encompassed by the statutory definition.

A third rule that might be used to find that homes do not qualify as schools is that when statutory language is ambiguous, the interpretation of those who execute the law should be considered "strongly persuasive," *e.g.*, Shealy v. Association Transp., 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960), or even "*prima facie* correct." *In re* Vanderbilt Univ., 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960). Under this rule of construction, it could be argued that the court in *Delconte* should have accorded great weight to the Attorney General's opinion, 49 N.C. Att'y Gen. 8 (August 9, 1979), which held home instruction permissible. *See* Amicus Curiae Brief [North Carolina School Boards Assn.] at 5, *Delconte*. The court of appeals noted that the general assembly had failed to respond to the Attorney General's opinions concerning home instruction. *Delconte*, 65 N.C. App. 267, 308 S.E.2d at 903. The supreme court conceded that the Attorney General's opinions were persuasive but concluded that they were not binding. *Delconte*, 313 N.C. at 387 n.3, 329 S.E.2d at 639 n.3.

It could also be argued that the deregulation statute applies only to institutions, because fire, health, and safety standards do not generally apply to private homes. *See* Amicus Curiae Brief [North Carolina School Boards Assn.] at 3-4, *Delconte*. Another argument against deregulation including home instruction is that establishment of a passing grade on a competency examination by a "chief administrative officer" implies that only institutions are contemplated. Generally, only institutions have chief administrative officers and issue diplomas.

N.C. GEN. STAT. § 155C-562 (1983), however, makes qualified nonpublic schools subject to "requirements of law" respecting fire, health, and safety. That few of these requirements apply to private homes, however, does not necessarily mean that a private home cannot be a school. It would appear reasonable to read the statute as specifying the requirements, *if any*, from which a school is not exempted. It would also seem reasonable to regard the minimum competency test score in N.C. GEN. STAT. § 115C-558 as a substitute for a formal diploma, although the competency test requirement is enumerated in an institutional context. These readings of the exclusivity and competency testing provisions are better interpretations, because the qualifying statute, N.C. GEN. STAT. § 115C-555, does not explicitly require that a school be an institution. Furthermore, as the trial court noted, violations of the compulsory attendance requirements are subject to criminal penalties, N.C. GEN. STAT. § 155C-380, and statutes entailing criminal penalties should be strictly construed. Revis Sand and Stone, Inc. v. King, 49 N.C. App. 168, 170, 270 S.E.2d 580, 581 (1980); Record at 53, *Delconte*.

154. Record at 53, *Delconte*.

155. N.C. GEN. STAT. § 115C-547 (1983).

religious charter.[156] The exclusivity provision of this statute[157] applies to any "school, operated by any church or other organized religious body as part of its religious ministry."[158] This definition might be interpreted to exclude home instruction in the *Delconte* case because Delconte's ministry was not that of an organized religious group.[159] This language also might imply that only institutional schools are permitted because organized religious bodies would be expected to maintain institutional schools. The policy of the statute, however, is to protect the rights of conscience.[160] The court might have held that even if the statute did not permit home instruction, the North Carolina Constitution guaranteed this right to the Delcontes on religious grounds. However, this holding would not have permitted parents to instruct their children at home on nonreligious grounds.

With respect to the quality of nonpublic education, there is little evidence that home schools or religious private schools do an inferior job of instructing children academically.[161] In fact, many parents who instruct their children at home may do a better job than the public schools.[162] Although the state has a

156. The Coordinator of Nonpublic Education testified: "The least number of students that an approved private school has, I believe, is 3. I do not believe that we have at this time a school that has only two pupils." Record at 34, *Delconte*. The Coordinator's use of the word "approve" was a mistake, because he had earlier stated that after passage of the deregulation legislation his office no longer "approved" schools but merely "recognize[d] that a school is in compliance with the law." *Id.* at 32. The Delcontes' lawyer noted that the State Board of Education had defined a school as having a teacher and curricula, both of which the Delcontes' home instruction program had. Plaintiff-Appellants New Brief at 8, *Delconte*.

Based on this testimony the trial court found that "if in addition to the two Delconte children being taught, one additional nonrelated child were taught in the school, then the Hallelujah School would have been acknowledged by the Office of Nonpublic Education." Record at 47, *Delconte*. To permit the number of unrelated children in attendance to be the deciding factor in defining home instruction programs as schools would be arbitrary because it would prohibit parents with eight children from instructing their children at home, but would allow parents with two children to instruct their children and one other at home; the addition of one unrelated child would make a school an institution.

In *Delconte* the state argued that North Carolina relies on collective parental pressure to ensure that children are well-educated in deregulated private schools. New Brief for the State at 18, *Delconte*. It could also be argued that the state relies on the concern of parents for their own children to ensure an adequate education. Parental concern could ensure quality home instruction despite the fact a child's education would be "dependent solely upon the ability and motivation of a *single* set of parents." New Brief for the State at 18, *Delconte*.

Before the court of appeals the State argued that the deregulation statute should apply only to "established educational institutions." Brief for the State at 13, *Delconte*, 65 N.C. App. 262, 308 S.E.2d 898. The Delcontes responded that this limitation would preclude the opening of new nonpublic schools. Plaintiff-Appellee's Brief at 8, *Delconte*, 65 N.C. App. 262, 308 S.E.2d 898. Before the North Carolina Supreme Court, the State argued instead that the statutory definition of school included only *organized* education institutions. New Brief for the State at 21, *Delconte*.

157. N.C. GEN. STAT. § 115C-554 (1983).

158. *Id.*

159. *See* Amicus Curiae Brief [North Carolina School Boards Assn.] at 3, *Delconte*.

160. N.C. GEN. STAT. § 115C-547 (1983).

161. *See* Lines, *supra* note 1, at 192-93; *see also Forsyth Woman educates her own children at home*, The News and Observer (Raleigh, N.C.), Nov. 12, 1985, at 16C, col. 3 ("Neither state nor federal officials [can] provide statistics on how home-school children perform as a group.").

162. *See Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 544-56 (1979) (testimony of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International); Heard, *Church-Related Schools: Resistance to State Control Increases*, EDUC. WEEK, Feb. 17, 1982, at 1, 10, 18; *see*

strong interest in ensuring that children are adequately educated, this interest can be satisfied through the use of achievement tests.[163] Such tests are a minimally intrusive means of ensuring that children receive adequate academic instruction.[164] Although a state might argue that this *post hoc* regulation is not a sufficient safeguard, achievement tests are the only objective way of evaluating the adequacy of *public* education.[165] If a student scores adequately on achievement tests, there is really no need to regulate home instruction by requiring that teachers be certified, a requirement that would effectively foreclose the home education alternative for most parents.[166]

Institutional schooling, however, whether public or private, imparts more to children than mere academic instruction. Institutional education places children in a group of their peers under the supervision of an adult other than their

---

also materials reproduced in Brief of Amici Curiae in Support of Appellant [The Rutherford Institute] at 219-38, *Delconte* (praising home instruction as a superior alternative).

163. Parents who educate their children at home generally do not challenge the right of the state to ensure the minimum academic competence of their children. *See* Ball, *Religious Liberty: New Issues and Past Decisions*, in A BLUEPRINT FOR JUDICIAL REFORM 327-49 (P. McCulligan & R. Rader ed. 1981). Similarly, "Christian schools have generally been willing to submit their 'product' voluntarily to reasonable evaluation by the state through achievement testing." Note, *State Regulation of Private Religious Schools in North Carolina—A Model Approach*, 16 WAKE FOREST L. REV. 405, 416 (1980). Courts and commentators are divided on the propriety of using achievement tests to satisfy a state's interest in ensuring adequate education. *See, e.g.*, Kentucky State Bd. of Educ. v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979) (encouraging the use of achievement tests to ensure that children are adequately educated); State v. Faith Baptist Church, 197 Neb. 802, 816-17, 301 N.W.2d 571, 579-80 (1981) (criticizing this use of achievement tests); *See* Devins, *supra* note 1, at 473-74 & n.228 (approving achievement testing to ensure adequate education); Note, *supra* note 2, at 374-77 (calling for much more intrusive state supervision of home education).

For a discussion of a prosecutor's objection to the introduction of standardized test scores of Christian school students in State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), see Rice, *supra* note 3, at 886. For another discussion of *Whisner*, see Stocklin-Enright, *supra* note 4, at 592-94. *See also* Lines, *supra* note 1, at 212-14 (discussing cases that deal with whether the state or the parents bear the burden of proof under statutes requiring "equivalent" instruction in lieu of public school attendance); Note, *supra* note 2, at 366-69 (discussing cases dealing with home instruction as an "equivalent" alternative); *supra* text accompanying note 90 (example of strict regulation of home instruction).

164. Home instruction need not foreclose future educational and career opportunities. A high school competency test can substitute as a high school diploma in a job search. The University of California at Berkeley admits home instructed students if they pass proficiency examinations. *See* Note, *supra* note 2, at 372; *see also* Williams, *Little Redwood Schoolhouse*, NEWSWEEK, Dec. 5, 1983, at 206 (Harvard University accepted student after 12 years of home instruction.).

165. *See* Devins, *supra* note 1, at 473. Poor performance, however, may not be grounds for immediate removal of a child from a home instruction situation:

> If it turns out that a child does not test as well as might have been hoped, however, it makes sense to remember that we do not remove our children from public school when they fail tests. The testing process should be viewed, at least initially in any case, as an opportunity to remedy any shortcomings that may be uncovered, unless the shortcomings are so significant as to reflect serious defects in the methodology of the home education program and substantial failure on the part of the child to make reasonable educational progress.

Perchemlides v. Frizzle, No. 16641, slip op. at 12, n.7 (Mass. Super. Ct. Nov. 13, 1978)

166. *See* Devins, *supra* note 1, at 472 (discussion of the permissibility of different types of state regulation of home education). *Compare* People v. Turner, 277 A.D. 317, 319-20, 98 N.Y.S.2d 886, 888 (1950) (equivalency requirement did not mandate instruction by certified teachers) *with* State v. M.M., 407 So. 2d 987, 989 (Fla. Dist. Ct. App. 1981) (parents conducting home instruction required to meet state laws and regulations pertaining to private tutors).

parents.[167] Some courts have held that the socialization of children in groups serves an important state interest in preparing children to be self-sufficient and to participate in society.[168] Other courts have suggested that sending children to school provides the state with an opportunity for professionals to discover problems created by inadequate child rearing.[169] This latter rationale is dubious at best, given that parents, not the state, have the initial and primary responsibility for their children's physical, mental, and social well-being.[170] The state should intervene only when parents fail in this responsibility. Except in clear-cut cases such as the physical abuse of children, no standard of "inadequate child rearing" can be applied to parents that does not lack consistency in administration and societal consensus. The argument that these debatable "problems" of adequate child rearing can be resolved by public school officials is really an argument that public schools should enforce the educational establishment's idea of the proper way to raise children. The concern that children will be physically abused by home educating parents is also unwarranted. Parents who take the time and trouble to devise a home instruction program for their children under state guidelines will not be the type of parents who physically abuse their children, except in the view of those who regard any physical chastisement of children as "abuse." This perceived danger is hardly an argument for erecting a purely institutional educational system. The argument that children should be

167. One commentator has encapsulated the following ideological defense of government schooling:

> 1. The problem of conflict between families and schools is one of balancing the interests of the two. Parents do have important rights and responsibilities, but society has the predominant responsibility for family morals and belief. . . .
> 2. One of the obligations of the public that can legitimately be carried out through school policy is the protection of children from "bad" parenting. . . .
> 3. Home schooling does not respect the rights of children to differ from parents and impose [sic] an even more rigid orthodoxy upon a dissenting child than any school system ever could.
> 4. School is an essential force of social cohesion. . . .
> 5. The socialization of children in groups is essential. Only through peer-group schooling can children learn to get along in a highly interdependent society.
> 6. The mixing of children from different backgrounds and from families with differing beliefs and values is vital to peace in a pluralistic society. . . .
> 7. The adequate function of the American democratic system requires that every child be taught the values of liberty as well as the skills of literacy. . . .
> 8. Children who are educated at home . . . may become a social burden in a complex society and may be deprived of economic opportunity.

S. ARONS, *supra* note 5, at 121-23.

168. *See, e.g.*, State v. Hoyt, 84 N.H. 38, 39, 146 A. 170, 170-71 (1929) (not unreasonable for state to require a socialization component). *Hoyt* was severely restricted by *In re* Pierce, 122 N.H. 762, 451 A.2d 363 (1982) (under statute allowing home education, due process requires that parents be informed of any deficiencies in their proposed program before permission to educate at home is denied). *See also In re* Sawyer, 234 Kan. 436, 439, 672 P.2d 1093, 1096 (1983) (noting with approval testimony that "a school with more children would be generally better for any child since it would provide more social interaction outside of the home," whether or not parents would be competent to teach); Stephens v. Bongart, 15 N.J. Misc. 80, 92, 189 A. 131, 137 (Essex County Ct. 1937) (schools are to instill character and good citizenship as well as impart education; given the complexities of modern life, home instruction cannot provide the requisite "experiences in group activity"). *But see* State v. Massa, 95 N.J. Super. 382, 386, 231 A.2d 252, 255 (1967) (describing the socialization rationale as "untenable").

169. *See, e.g.*, State v. Riddle, 285 S.E.2d 359, 364 (W. Va. 1981).

170. *See infra* note 174 and accompanying text.

socialized in institutional educational settings deserves more discussion, but it is equally flawed.[171]

Historically, parents have retained the right to shape their children's socialization.[172] Today, through compulsory education laws, the state limits the exercise of parental discretion to a greater extent than in earlier times.[173] The "correct" socialization of children, however, is not readily defined in a pluralistic society. The law generally presumes that a parent will care for his or her child and that a parent is more sensitive to the child's needs than the state can be.[174] Except in areas such as child labor in which parental discretion exercised against societal consensus would obviously be detrimental to the child,[175] the law favors permitting parents to make child rearing decisions.[176]

The issue of who should decide how a child is to be socialized is inextrica-

171. For a brief discussion of opposing schools of educational theory, see Devins, *supra* note 1, at 468-70 (discussing these theories in the context of the scope of legitimate state authority).

172. *See, e.g.* State Bd. of Educ. v. Purse, 101 Ga. 422, 28 S.E. 896 (1897) (Schools exist for the benefit of the parent, not the state or the child.); Rulison v. Post, 79 Ill. 567, 573 (1875) (Education and nurture of the child is left to the discretion of parents.); T. FINEGAN, FREE SCHOOLS: A DOCUMENTARY HISTORY OF THE FREE SCHOOL MOVEMENT IN NEW YORK STATE 53 (1921) (important issue in the debate over establishing public schools was whether parents could demand such state aid to education, not whether states could compel child's attendance); E. KNIGHT, EDUCATION IN THE UNITED STATES 100 (3d ed. 1951) (dealing with pre-revolutionary Massachusetts); J. MILLER, THE FIRST FRONTIER: LIFE IN COLONIAL AMERICA 224-25 (1966) (education was left solely to parents in colonial America); *see also* Trustees of Schools v. People, 87 Ill. 303, 7 N.E. 262 (1887) (in a suit to *gain* admittance of a child to public school, it was held that the parent's command that the child not study grammar, resulting in child's failure of proficiency examinations in that course, provided no basis for excluding child from public school). These authorities and others are discussed more extensively in Note, *supra* note 1, at 191-93. *See also* S. BLUMENFELD, NEA: TROJAN HORSE IN AMERICAN EDUCATION 1-39 (Public education as a norm for children rather than an available option to parents was a usurpation of the traditional parental prerogative in early America.). The common law recognized a parental right to control the educational and social aspects of a child's development. *See* Note, *supra* note 2, at 359.

173. *See* Note, *supra* note 2, at 359

174. *See* Parham v. J.R., 442 U.S. 584 (1979) (elaborate review procedures are not necessary when parents commit children to a psychiatric facility because parents are rebuttably presumed to know and act upon the best interests of their children); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1354 (1980) [hereinafter cited as *Developments in the Law*]. For a discussion of parental authority to make decisions for the child, see Stocklin-Enright, *supra* note 4, at 581-86. For cases on parental autonomy involving the due process clause, see *id.* at 567 n.19. For discussions of cases involving the right to family privacy, see Devins, *supra* note 1, at 445-56 n.70, 446-47 n.72. *See also* Note, *supra* note 1, at 204 ("Historically, the compelling state interest in education has been not so much the welfare of the individual child as the welfare of the collective state.").

For a discussion of the proposition that a child has the right to make his or her educational choices, see Note, *supra* note 2, at 373-74.

175. The constitutionality of laws regulating child labor was upheld in Prince v. Massachusetts, 321 U.S. 158 (1972).

176. As one court has observed:

> The question here, of course, is not whether the socialization provided in the school is beneficial to a child, but rather, who should make that decision for any particular child. Under our system, the parent must be allowed to decide whether public school education, including its socialization aspects, is desirable or undesirable for children.

Perchemlides v. Frizzle, No. 16641, slip op. at 13 (Mass. Super. Ct. Nov. 13, 1978); *see also* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 806 (1978) (discussing a parent's interest in "living one's life through one's children, [which] might be called the parent's right to exercise his religion *through* the child, and to extend *through* the child ideas, language, and customs which the parent believes to be important").

bly intertwined with our society's emphasis on personal liberty, family integrity, and societal diversity. Allowing a parent to control his or her child's upbringing, except when parental control undeniably harms the child, guards against the danger of state indoctrination.[177] Many parents fear that "the state, if left to its own devices, will create a monolithic educational creature that will stamp out societal diversity."[178] Indeed, as schools move beyond the teaching of traditional subjects to such controversial subjects as evolution,[179] value free sex education,[180] "moral values education,"[181] and politics,[182] sometimes employing

177. *See Developments in the Law, supra* note 174, at 1354.

178. Devins, *supra* note 1, at 438.

179. Although evolution is generally taught as if it were an established scientific fact, it is merely a theory that has been convincingly challenged by many learned scientists. *See, e.g.*, H. MORRIS, EVOLUTION IN TURMOIL (1982); A. WILDER-SMITH, MAN'S ORIGIN, MAN'S DESTINY (1975). Creation theory is not simply a religious position; it can be scientifically expounded without reliance on the Bible. *See, e.g.*, A. WILDER-SMITH, THE CREATION OF LIFE: A CYBERNETIC APPROACH TO EVOLUTION (1970); A. WILDER-SMITH, THE NATURAL SCIENCES KNOW NOTHING OF EVOLUTION (1981). It is hardly surprising that the teaching of evolution as fact without serious reference to the theory of creation would deeply disturb many parents, because the theory of evolution not only can instill a scientific opinion but, more significantly, may inculcate a quasi-religious world view. Before creation scientists entered the debate,

> [i]n the world of secular education, evolutionary philosophy was not only dominant in biology teaching, but throughout the whole curriculum. The natural sciences were based on evolutionary naturalism, the social sciences emphasized evolutionary socialism, the humanities stressed evolutionary humanism, and even the business and technology courses imbued a spirit of evolutionary materialism.

H. MORRIS, *supra*, at 114.

For a discussion of the impact of the evolution philosophy on public education, see S. BLUMENFELD, *supra* note 172, at 40-48 (1985).

180. Parents may legitimately object to birth control information being given to their children. K. GOW, YES, VIRGINIA, THERE IS RIGHT AND WRONG 197-98 (1985). It has been argued that the effect of sex education courses as they are frequently conducted is to encourage or even pressure children to have extramarital sexual relations and to advance the view that all forms of sexual practice and familial arrangements are equally acceptable. *See id.* at 109-14. Furthermore, the rationale for sex education that goes beyond biological information is based less and less upon the need to prevent teenage pregnancy and venereal disease; it is admitted by some educational leaders that the effect of sex education on these problems is negligible and that the real purpose of sex education is to prepare children to have sexual relationships. *See id.* at 112-14. Also, sex education as imparted may actually minimize dangers such as venereal disease in a student's mind. *See id.* For examples of "moral values exercises" which promote relativity of values concerning sexual issues and which are commonly used in public schools, see *id.* at 42-44, 61-62, 188-89. For a discussion of moral values education, which takes a value-neutral approach to *all* moral issues, see *infra* note 181 (Many parents would find the "moral values education" commonly imparted in public schools to be a form of indoctrination in the philosophy of moral relativism.).

181. The moral values education conducted in public schools today is widely perceived as instruction in a dogma of moral relativism or secular humanism, the very opposite of the neutral or pluralistic perspective it purports to be. K. GOW, *supra* note 180, at 164-82; *see also* S. BLUMENFELD, *supra* note 172, at 225-40 (discussing growth of humanistic curriculum in schools). The three main approaches to moral values education are values clarification, moral reasoning, and the reflective approach. K. GOW, *supra* note 180, at 16. All three approaches are widely viewed as relativistic, and values clarification is the most popular approach. *Id.* at 225. For discussions of values clarification, see Bennett & Dellattre, *Moral Education in the Schools*, 50 PUB. INTEREST 81-98 (1978); Oldenquist, *Moral Education Without Moral Education*, 49 HARV. EDUC. REV. 240, 247 (1979).

The Supreme Court has noted that a state may not impose " 'a religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." School Dist. v. Schempp, 374 U.S. 203, 225 (1963). *See* Whitehead & Conlan, *supra* note 3, at 49-42 (discussing state promotion of the religion of secular humanism). Because moral values education is not limited to public education, prohibition of home instruction when no other alternative to moral indoctrination exists would greatly impinge on an objecting parent's religious liberty. Parental removal of children from certain

psychological techniques many consider extremely dangerous,[183] the possibility of state indoctrination increases enormously, making imperative the preservation of the home instruction alternative.[184]

---

school activities to avoid moral values education is not a viable option, because moral values education is designed to be an integral part of the entire school curriculum. K. GOW, *supra* note 180, at 107. Besides violating parental perogatives to govern children's moral upbringing, moral values education approaches are considered by many to be very hazardous to the psychological and emotional health of children. *See infra* note 183.

Sometimes, pupils are admonished not to discuss the moral education they receive with their parents, and parents "have been either implicitly or explicitly discouraged from examining controversial classroom materials. . . . One would hope that this does not happen frequently, but the fact that it is documented . . . is alarming." K. GOW, *supra* note 180, at 187. Gow points out that some moral values education leaders advise teachers to engage in subterfuge to evade parental objections. *Id.* at 195-98 (discussing H. KIRSHENBERG, ADVANCED VALUES CLARIFICATION (1977)).

The General Education Provisions Act, 20 U.S.C. § 1232h(a) (Supp. 1985), provides that in federally assisted educational programs, instructional materials "designed to explore or develop new or unproven teaching methods or techniques" must be made available for parental inspection. *Id.* Complaints brought under this statute are governed by 34 C.F.R. § 98 (1985). *See also infra* note 183 (psychological practices in public schools and applicable federal law). These laws, however, are not widely known and are seldom used by dissenting parents. K. GOW, *supra* note 180, at 156. For a discussion of these and other laws pertaining to family rights, see *id.* at 153-61. For a sample form letter parents might use to prevent objectionable moral and political instruction of their children and a list of educational practices to which parents might legitimately object, see *Please Excuse Johnny from Death Ed.*, HARPER'S, May 1985, at 24 (text of material distributed by Phyllis Schlafly's Eagle Forum of Alton, Illinois). *See also* CHILD ABUSE IN THE CLASSROOM (P. Schlafly ed. 1985) (excerpts from testimony given by parents and teachers in United States Department of Education Hearings on the General Education Provisions Act).

182. *See, e.g.*, M. GABLER & N. GABLER, *supra* note 4 (discussing lack of balanced information in education); Brooks, *Back to School*, THE AMERICAN SPECTATOR, Oct. 1985, at 321 (discussing the use of "simulations" of past decisions by political leaders in a history class); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1134 (1979) (discussing claim of some school officials that promoting certain political values furthers a societal interest).

183. *See, e.g.*, K. GOW, *supra* note 180, at 33-49 (discussing various moral values education exercises for students, such as the "life raft" exercise in which students pretend they are deciding which member of the group must perish so that the others may live, based on a group assessment of the worth of each individual). Dr. Gow observes:

> In the late 1960s many adults learned from painful experience that to take part in sensitivity training and encounter groups led by untrained people can be disastrous. Literally thousands of people laid themselves open to enormous psycho-social damage. Recognizing this, many are concerned that now, in the name of values education, the same techniques are being applied to children in the classroom, often without parents' knowledge and consent.

Id. at 49.

Another disturbing aspect of this practice of amateur psychology in public schools is that students are often required to disclose details about their inner thoughts or family life. For example, one moral values education technique is for a teacher to interview a student about intimate matters before the class. *Id.* at 45-49. This threat to a student's privacy is compounded by the fact schools might keep records of responses to such probings along with the teacher's subjective evaluation of their significance. *Id.* at 198-201. Under federal law, students may not be required to submit to psychological programs whose primary purpose is to extract such information. 20 U.S.C. § 1232h(b) (Supp. 1985). Procedures for bringing complaints for violations of this statute are set forth in 34 C.F.R. § 99 (1985). *See also supra* note 181 (discussing similar laws). General family privacy rights are protected by 20 U.S.C. § 1232g (1982); 34 C.F.R. § 99 (1985).

184. *See* J. WHITEHEAD, THE NEW TYRANNY 3 (1982). Stephen Arons opines that public schools inculcate certain values in children, including:

> 1. Authority in society should be organized hierarchically, and it is appropriate for those of less authority to cultivate attributes of obedience and passivity.
>
> 2. Truth is prescribed and established by authority and learning means understanding and accepting the official version of reality.
>
> 3. Material acquisition, rather than spiritual condition, is the most significant mea-

Private schools provide no acceptable alternative to parents who wish to instill their own values in their children[185] if, like the Delcontes,[186] these parents either do not agree with the values taught at private schools or cannot afford private schools. Although some public educators argue that public education allows children to be exposed to different values so that they may choose values for themselves,[187] this justification undermines parental autonomy. Exposure to a multitude of values may leave children confused and valueless, rendering them susceptible to peer-created values rather than eager to explore or redefine their own values.[188]

To avoid the dangers of state indoctrination and preserve the diversity in society that results from children learning values from their own families, the North Carolina Supreme Court should recognize a right to home education guaranteed by the North Carolina Constitution. The right is far too important

---

sure of personal success and social progress; and measurement, rather than intuition, defines knowledge.

4. Competition is more important than cooperation.

5. The ability to follow directions is more important than creativity, and dissent is either the result of poor communication, willful misanthropy, or emotional instability.

6. Poverty, malnutrition, disease, oppression, and violence are not created by anyone who lives regarding the society's rules, and people in general should perform whatever acts are required by their roles without ethical discomfort.

7. Compulsion and coercion are acceptable means of creating proper behavior including learning.

8. There are specific character attributes associated with race, gender, class and age that cannot be changed and upon which may be based the distribution of power, wealth, and dignity.

9. Institutional schooling contributes to the progress of the individual and society, upgrades general morality, reduces prejudice, and protects each rising generation from the mistakes of the previous generation.

10. Manual labor can never attain the dignity or power of intellectual labor; and art, music and mysticism are nonessential.

S. ARONS, *supra* note 5, at 100-101.

185. "In court, Christian educators and parents argue that state efforts to limit or prohibit home instruction deprive them of their liberty to freely carry out their religious mission in the form of Christian education. . . .' " Devins, *supra* note 1, at 439 (quoting Bangor Baptist Church v. State, 549 F. Supp. 1208, 1216 (D. Me. 1982) (citing plaintiff's petition)); *see also* Duro v. District Attorney, 712 F.2d 96, 97 (4th Cir. 1983) (Plaintiff removed his children from school to avoid the influence of the "unisex movement" and secular humanism.), *cert. denied*, 465 U.S. 1006 (1984); State v. Moorhead, 308 N.W.2d 60, 64 (Iowa 1981) (defendants claimed that prohibiting home instruction violated their free exercise rights); State v. Shaver, 294 N.W.2d 883 (N.D. 1980) (defendants claimed that law requiring compulsory attendance at public or approved private school violated free exercise right). *But see* State v. Riddle, 285 S.E.2d 359, 366 (W. Va. 1981) ("[It is] inconceivable that in the twentieth century the free exercise clause . . . implies that children can lawfully be sequestered on a rural homestead during all of their formative years . . . ."). State indoctrination, however, differs not only from some single set of values called "Christian," but also from other sets of values held by parents who choose alternatives to public education.

186. Record at 42, *Delconte*, 65 N.C. App. 262, 308 S.E.2d 898.

187. *See supra* note 167.

188. *See* K. GOW, *supra* note 180, at 107-09. Another reason parents may value the right of home education is that there is now a growing movement to require formal schooling for children of kindergarten age and younger. *See* Fiske, *Early Schooling Is Now the Rage*, N.Y. Times, April 13, 1986, § 12 (Magazine), at 24. Whatever the merits of early academic instruction, requiring removal of a child from the home before the age of six invades parental autonomy significantly. Should the North Carolina General Assembly ever require pre-school instruction, the preservation of the home study option would at least provide parents with the opportunity to keep their children at home during these early formative years.

to be left to legislation. It would be quite easy in the future for advocates of exclusively institutional education to find an isolated incident of inadequate home education and create a furor over North Carolina's "backward" educational statutes, leading to legislative preclusion of the home study option in North Carolina. The North Carolina Department of Public Instruction is already arguing for the enactment of serious restraints on parents who educate their children at home. Admitting that most educators desire "legislation to prohibit home instruction altogether as a substitute for public school attendance,"[189] the Department notes that the "far right"[190] could "make such legislation difficult to pass."[191] Therefore, the Department offers a series of restrictions on home schools, including the requirement that a home-instructing parent have a college degree.[192] Furthermore, the Department proposes a "required standard course of study,"[193] which potentially could impose on children ideas and values that have prompted some dissenting parents to remove their children from public school.

In their treatments of the North Carolina constitutional issues raised in *Delconte*, neither the court of appeals[194] nor the supreme court[195] mentioned the North Carolina Constitution's right of conscience provision[196] upon which the policy statement of the deregulatory statute pertaining to religious schools[197] is based. The North Carolina Constitution guarantees citizens a "right to worship Almighty God according to the dictates of their own consciences"[198] and declares that the right of conscience shall not be interfered with "in any case whatever."[199]

One North Carolina case, *In re Williams*,[200] suggests that the religious freedom guarantees of the North Carolina Constitution are coextensive with the rights protected by the federal constitution's free exercise clause. In *Williams* a minister argued that his refusal to testify for either the state or the defense in the

189. Peek, Home Instruction and the Compulsory Attendance Act, School Management Advisor, Series 3, at 3 (1986) (available from the North Carolina Dept. of Public Instruction, Education Bldg., Raleigh, N.C., 27603-1712).

190. *Id.*

191. *Id.*

192. *Id.* at 2.

193. *Id.*

194. *Delconte*, 65 N.C. App. 267-68, 308 S.E.2d 903.

195. *Delconte*, 313 N.C. at 400-01, 329 S.E.2d at 646-47. The Christian Legal Society argued before the supreme court that the North Carolina Constitution guarantees parents the right to home education. Amicus Curiae Brief [Christian Legal Society] at 12-14, *Delconte*.

196. N.C. CONST. art. I, § 13.

197. N.C. GEN. STAT. § 115C-547 (1983). The Kentucky Constitution includes parental educational rights in its "conscience clause." KY CONST. § 5. *See* Board of Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (construing the Kentucky provision), *cert. denied*, 446 U.S. 938 (1980); *see also* Lines, *supra* note 1, at 211 (brief discussion of this provision).

Some state constitutions require that the state have some form of compulsory education. *See* COLO. CONST. art. IX, § 11; IDAHO CONST. art. IX, § 9; N.C. CONST. art. IX, § 3; OKLA. CONST. art. XIII, § 4; VA. CONST. art. IV, § 3.

198. N.C. CONST. art. I, § 13.

199. *Id.*

200. 269 N.C. 68, 152 S.E.2d 317 (1967) (construing N.C. CONST. art. I, § 26, amended 1946) *cert. denied*, 388 U.S. 918 (1967). Article I, § 26 is currently codified at N.C. CONST. art. I, § 13.

rape trial of a member of his congregation was protected under the North Carolina Constitution and the United States Constitution.[201] The court held that a minister called as a witness to a crime could be compelled to testify despite these guarantees of religious freedom.[202] It also held that the protections of North Carolina's conscience clause are not limited to members of organized religious bodies.[203] In addition, the court stated that the conscience clause guarantee "is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States."[204] Consequently, the conscience clause does not protect a person's sense of ethics,[205] and a genuine religious belief may be infringed if it is necessary to effect a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[206] As an illustration, the court quoted a passage from *Prince v. Massachusetts*,[207] in which the United States Supreme Court held that states may require school attendance, regulate child labor, and restrict parents' control " 'in many other ways.' "[208]

Although *Williams* may suggest that the recent decision in *Duro* on the federal free exercise clause defines the limits of North Carolina's conscience clause protection for home educators, there are two reasons to reject this analysis. First, it is doubtful that the *Williams* court really ceded the power to define the guarantees of North Carolina's conscience clause to the federal courts. States are generally free to extend greater protection of basic rights to their citizens than the federal constitution guarantees.[209] Second, in the later case of *Heritage Village Church v. State*[210] the North Carolina Supreme Court noted that the free exercise clause and the North Carolina conscience clause, together with North Carolina's prohibition of discrimination on the basis of religion,[211]

201. 269 N.C. at 73, 152 S.E.2d at 321.

202. *Id.* at 81, 152 S.E.2d at 327.

203. *Id.* at 78, 152 S.E.2d at 325. This interpretation refutes the North Carolina School Boards Association's argument that the provisions of the statute deregulating schools of religious charter are limited to organized religious groups. *See* Amicus Curiae Brief [North Carolina School Boards Assn.] at 3, *Delconte*. Because N.C. GEN. STAT. § 115C-547 (1983) is based upon the conscience clause, the provisions are designed to foster religious freedom. Thus, the argument of the State that the deregulation provisions only apply to educational institutions, New Brief for the State at 21, *Delconte*, is also contrary to the *Williams* interpretation of the conscience clause. *Williams* extends religious guarantees to unorganized as well as organized religious groups.

204. *Williams*, 269 N.C. at 78, 152 S.E.2d at 325.

205. *Id.*

206. *Id.* at 80, 152 S.E.2d at 326 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

207. 321 U.S. 158 (1944).

208. *Williams*, 269 N.C. at 79, 152 S.E.2d at 326 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). For a brief discussion of *Williams*, *see* Pollitt & Strong, *Constitutional Law*, 45 N.C.L. REV. 855, 862-64 (1967); *see also* State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (state may prohibit handling of poisonous snakes over religious liberty objections of members of a religious sect), *appeal dismissed*, 336 U.S. 942 (1979).

209. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983) (recognizing that "independent and adequate" state grounds in a search and seizure case might provide greater procedural protection to criminal defendants than the fourth amendment, but requiring a clear statement by a state court that its decision rested independently on that state's constitution).

210. 299 N.C. 399, 263 S.E.2d 726 (1980).

211. N.C. CONST. art. I, § 19.

"coalesce into a singular guarantee of freedom of religious profession and worship."[212] The court invalidated an act that required submission of reports on charitable solicitations from churches that received financial support primarily from nonmembers, but did not require such reports from churches that received support mainly from members.[213] The court noted that the act had a valid secular purpose in protecting the public from fraud,[214] but held that it violated the North Carolina Constitution not only because it involved excessive entanglement of government with religion and interference with the rights of conscience,[215] but also because it treated religious organizations unequally.[216] If treating churches that receive support primarily from nonmembers differently from those that are mainly supported by their own members constitutes religious discrimination, then it would also violate the North Carolina Constitution to place restrictions on religious parents who wish to educate their children at home than on those who enroll their children in private institutional schools. This discrimination would be particularly offensive to those parents who, like the Delcontes,[217] do not share the religious views of a religious institutional school.[218] *Heritage Village* thus provides a clearer exposition of North Carolina religious freedom guarantees than *Williams*.

The North Carolina Constitution, however, apparently allows home education without a showing that religious belief has been infringed. Article IX, section 3 provides that every child of appropriate age and physical and mental ability shall attend public schools "unless educated by other means."[219] Although the state has the duty "to guard and maintain"[220] the privilege of education, this does not mean that the "other means" by which children may be educated must be those expressly permitted by the general assembly. If these constitutional provisions were interpreted otherwise, the general assembly would be empowered to foreclose home education options including those that are demonstrably better than public schools.[221] Additionally, the "other means" provision implies that guarding and maintaining the privilege of education involves the protection of parental educational prerogatives as well as ensuring that children are educated in some fashion. Allowing parents to choose the home instruction option while requiring achievement testing protects the interests of

212. *Heritage Village*, 299 N.C. at 406, 263 S.E.2d at 730.

213. *Id.* at 405, 263 S.E.2d at 729.

214. *Id.* at 408, 263 S.E.2d at 731.

215. *Id.* at 416, 263 S.E.2d at 736.

216. *Id.* at 413-14, 263 S.E.2d at 734-35.

217. Record at 42, *Delconte*.

218. Yet another reason to think that the religious clauses provide religious parents a right to educate their children at home is a provision of the North Carolina Constitution that provides that the state shall "encourage" schools, libraries, and the means of education because "religion, morality, and knowledge" are "necessary to good government." N.C. CONST. art. IX, § 1. Although imparting religion in public schools is now prohibited by federal constitutional law, *see, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding state-sponsored prayer in public schools unconstitutional), the state would actually be inhibiting the general religion "necessary to good government" by constricting the religious bases for private education.

219. N.C. CONST. art. IX, § 3.

220. *Id.* art. I, § 15.

221. New Brief for the State at 19-20, *Delconte*.

both parent and child in the privilege of education.[222]

When parental authority and family autonomy are curbed to implement the laudable goal of educating children, the vast majority of citizens readily accepts a great degree of state supervision of education. However, the danger of state indoctrination, either actual or potential militates against placing significant burdens on the home instruction option. The North Carolina compulsory education statutes provide enough state supervision to ensure that children receive an adequate education without creating any significant restriction on parents' rights to direct the moral, ideological, and religious upbringing of their children. The supreme court's holding in *Delconte* recognizes that the educational statutes allow home instruction. The court should rule that the educational provisions and the conscience clause of the North Carolina Constitution also guarantee the right to home instruction.

EDWARD KNOX PROCTOR V

222. Assuming religious parents have the right to educate their children at home, equal protection of the laws under N.C. CONST. art. I, § 19 would probably protect nonreligious parents as well. *See supra* notes 205-13 and accompanying text; *cf.* United Nations Universal Declaration of Human Rights § 26(3) ("[P]arents have a prior right to choose the kind of education that shall be given their children.").

For an early philosophical defense of the right to home education with standardized testing as a safeguard against inadequacy, see J. MILL, ON LIBERTY 103-06 (E. Rapaport ed. 1978). Mill was home educated. *See* Brief for Amici Curiae in Support of Appellant [The Rutherford Institute] at 8, *Delconte.*