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Constitutional Law - Compulsory School Attendance - Who Directs the Education of a Child - State v. Edgington

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CONSTITUTIONAL LAW—Compulsory School Attendance—Who Directs the Education of a Child? *State v. Edgington*

I. INTRODUCTION

State v. Edgington[1] determined that a New Mexico statute prohibiting parental home instruction[2] does not violate the equal protection clauses of the federal and state constitutions.[3] A Socorro family had challenged the statute's constitutionality on the grounds that it abridged their parental right to direct the education of their children.[4] The New Mexico Court of Appeals, however, found that the statute was rationally related to state interests in compulsory school attendance.[5] This Note examines the rationale and implications of the *Edgington* decision.

II. STATEMENT OF THE CASE

Don and Paula Edgington did not enroll their children in public schools for the 1981-82 school year.[6] Instead, they taught their two school-age children at home, in contravention of a New Mexico statute that prohibits parental home instruction.[7] After Socorro public school officials became aware of the situation, the Edgingtons were convicted in Socorro County

1. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645, *cert. denied sub nom.* Edgington v. New Mexico, 52 U.S.L.W. 3342 (U.S. Nov. 1, 1983) (No. 83-5067).

2. N.M. Stat. Ann. § 22-1-2(I) (Repl. Pamp. 1981) defines a private school for purposes of fulfilling compulsory school attendance requirements set out in N.M. Stat. Ann. § 22-12-1 to -7 (Cum. Supp. 1983).

3. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18.

4. 99 N.M. at 719, 663 P.2d at 378.

5. *Id.* at 719, 663 P.2d at 378.

6. *Id.* at 717, 663 P.2d at 376. The New Mexico Constitution requires every child of school age and sufficient physical and mental ability to attend a public or "other" school as prescribed by law. N.M. Const. art. XII, § 5. The state's Compulsory School Attendance Act prescribes the conditions that fulfill the constitutional attendance requirement, including enumeration of what "other" types of schools will satisfy the state. The Act provides that students must attend "a public school, private school, or state institution" to comply with the law. N.M. Stat. Ann. § 22-12-2(A) (Cum. Supp. 1983).

7. Under the New Mexico Public School Code, a private school is defined as a school offering programs of instruction "not under the control, supervision, or management of a local school board *exclusive of home instruction offered by the parent, guardian, or one having custody of the student*" (emphasis added). N.M. Stat. Ann. § 22-1-2(I) (Repl. Pamp. 1981).

Magistrate Court of violating the New Mexico Compulsory School Attendance Act.[8]

The Edgingtons appealed their conviction to the Socorro County District Court.[9] The *de novo* review procedure[10] required a retrial of the matter, giving rise to the Edgingtons' motion to dismiss the charges against them.[11] The Edgingtons asserted as grounds for dismissal, first, that their children had attended school within the meaning of New Mexico's public school law,[12] and second, that the home instruction prohibition violated their federal and state rights to free exercise of religion,[13] to privacy,[14] and to equal protection of the laws.[15]

After an evidentiary hearing on the motion, the district court concluded that the Edgingtons had provided their children with a supervised program of instruction as required by state law.[16] The court went on to hold that the home instruction exception contained in New Mexico's private school

8. 99 N.M. at 716-17, 663 P.2d at 375-76. The Socorro school officials followed the procedures imposed by state law, which required them, on learning of a violation of the state's attendance policy, to serve notice of such violation on the parents or guardians of the truant child. N.M. Stat. Ann. § 22-12-7(B) (Cum. Supp. 1983). The Edgingtons were notified and consequently charged under the state law providing that a parent or guardian who continues in violation of the Compulsory School Attendance Act after such notice, whether by act or omission, is guilty of a petty misdemeanor. N.M. Stat. Ann. § 22-12-7(D) (Cum. Supp. 1983).

9. 99 N.M. at 717, 663 P.2d at 376.

10. *See* N.M. Stat. Ann. § 35-13-2(A) (1978) (appeals from magistrate court shall be tried *de novo* in district court).

11. Record of Evidentiary Hearing at 1, 99 N.M. 715, 663 P.2d 374 (Ct. App. 1983) [hereinafter cited as Record]. The transcript is on file at the University of New Mexico Law Library.

12. The Edgingtons first argued that their children had attended school within the meaning of the Public School Code, namely a "supervised program of instruction designed to educate a person in a particular place, manner, and subject area." N.M. Stat. Ann. § 22-1-2(S) (Repl. Pamp. 1981); Record at 50-52. This definition of a "school" and the definition of a "private school" provided by N.M. Stat. Ann. § 22-1-2(I) offer different and potentially conflicting characterizations of a school. *See supra* note 7.

In support of their argument, the Edgingtons offered evidence to the effect that Mrs. Edgington had been the children's primary teacher, although both parents had supervised the children's instruction. They established that Mrs. Edgington had been certified as an elementary school teacher in New Mexico between 1967 and 1978 and had taught for two and one-half years in the Socorro Public Schools. She also was certified to teach by the state of Missouri during 1981-82. The Edgingtons had implemented a curriculum provided for them by the Christian Liberty Academy of Illinois.

The state challenged the motion to dismiss on grounds that, as applied to the Compulsory School Attendance Act, the private school definition prohibited enrollment in a program of parentally supervised home instruction from fulfilling the state's attendance requirement. *See* Record at 49-50.

13. U.S. Const. amend. I, § 2; N.M. Const. art. II, § 11. *See also* Record at 10-14.

14. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18. Specifically, the Edgingtons had argued that their right to direct their children's education implicated privacy rights protected by federal and state due process clauses. *See* Record at 10-14.

15. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18. *See also* Record at 10-14.

16. State v. Edgington, 99 N.M. 715, 717, 663 P.2d 374, 376 (Ct. App. 1983). *See also supra* note 12.

definition violated the equal protection clause.[17] The district court invalidated the definition as "unreasonable, arbitrary, and [without] some ground of difference having a fair and substantial relation to the objects of the Public School Code."[18] The state appealed the resulting dismissal of the charges.[19]

The court of appeals reversed the district court's judgment and upheld the constitutionality of the home instruction exception. The court remanded the case with instructions to reinstate the charges against the Edgingtons.[20]

The court of appeals in *Edgington* based its holding on a four-point rationale. First, rather than focusing on the Edgingtons' assertion of their parental right to direct their children's education, the court reframed their equal protection claim in terms of the children's right to receive an education. Relying on the United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez*,[21] the court of appeals found that a child's right to an education was not fundamental, and thus did not trigger strict judicial scrutiny of the statutory classification embodied in the home instruction exception.[22]

Second, the *Edgington* court rephrased the rational basis test articulated by the district court.[23] The court of appeals' test would sustain a statutory

17. 99 N.M. at 717, 663 P.2d at 376. The district court accepted the Edgingtons' contention that, in light of Santa Fe Community School v. New Mexico State Bd. of Educ., 85 N.M. 783, 518 P.2d 272 (1974), the state could no longer compel any program of state supervised instruction in private schools. *Santa Fe*, together with the district court's finding that the Edgingtons had provided a supervised program of instruction, set up the Edgingtons' argument that, as applied to them, the home instruction exception to the private school definition was arbitrary and unreasonable.

18. 99 N.M. at 717, 663 P.2d at 376. The district court did not reach the Edgingtons' free exercise and due process claims because it found that the private school definition violated the Edgingtons' equal protection rights. Consequently, these issues were not considered on appeal. *Id.* at 718, 663 P.2d at 377.

19. *Id.* at 717, 663 P.2d at 376.

20. *Id.* at 720, 663 P.2d at 379.

21. 411 U.S. 1, 37 (1973). *Rodriguez* involved an equal protection challenge to the Texas funding formula for public education. The formula netted unequal school district revenues based, in part, on differences in property tax incomes. The Court implied that students might have a fundamental right to an education providing "basic minimal skills." *Id.* Nonetheless, the Court found a lower court's conclusion that education was a fundamental right "unpersuasive" and applied the rational basis test to the statutory scheme at issue. It was this language from *Rodriguez* that persuaded the *Edgington* court that education is not a fundamental right. 99 N.M. at 718, 663 P.2d at 377.

The *Rodriguez* Court also had suggested that legislation aimed at denial of the free exercise of a constitutionally protected right might merit more intense scrutiny, 411 U.S. at 37-38, but the *Edgington* court did not pursue this line of inquiry. The important distinction, however, is that *Rodriguez* did not involve parental rights regarding children's education, the central issue raised by the Edgingtons.

22. 99 N.M. at 718, 663 P.2d at 377. The question whether a *parent's* right to direct a *child's* education is fundamental, thereby triggering strict scrutiny, is discussed *infra* at note 34.

23. *See supra* text accompanying note 18.

classification whenever "any state of facts may be reasonably conceived to justify it."[24]

Third, the court of appeals identified two "reasonably conceived" state interests, which it inferred from the legislative origins of the home instruction exception:[25] (1) prevention of parentally approved truancy, and (2) supervision of the child's educational development by someone other than a parent.[26] Finally, the court found that the home instruction exception was rationally related to these legitimate state interests, and thus did not violate the Edgingtons' equal protection rights.[27]

III. DISCUSSION AND ANALYSIS

State v. Edgington establishes that parents may not choose to educate their own children at home, no matter how educationally sound the curriculum and the teaching methods employed. The court of appeals reached this conclusion notwithstanding its recognition of the contradictory effect of *Santa Fe Community School v. New Mexico State Board of Education*,[28] which permits parents to send children to an unregulated private school.[29]

Close examination of the four points of the court's rationale in *Edgington* suggests that this anomalous result is unjustified. As analysis of

24. 99 N.M. at 718, 663 P.2d at 377.

25. *Id.* at 719, 663 P.2d at 378. The private school definition, including the home instruction exception, was drafted in 1975 in order to align New Mexico school law with the New Mexico Supreme Court decision in Santa Fe Community School v. New Mexico State Bd. of Educ., holding state supervision, management, and control of nonpublic schools unconstitutional. 85 N.M. at 783, 518 P.2d at 272. The State Department of Education [hereinafter cited as State Department] created the Task Force for Nonpublic Schools subsequent to the *Santa Fe* decision. The Task Force was to determine the nature and extent of the state's constitutional authority to approve private school courses of instruction, pursuant to meeting requirements of the Compulsory School Attendance Act. Position Paper of the Task Force For Nonpublic Schools at 1-2 (appended to Record).

The Task Force initially determined that the most desirable means to reconcile the respective interests of parent, child, and state lay in abolishing the compulsory attendance requirement. Position Paper at 2. Inasmuch as this approach entailed an amendment to the New Mexico Constitution, however, the Task Force agreed upon a less drastic amendment to the Public School Code, calling for state deregulation of nonpublic schools. *Id.* The Code was revised accordingly. *See* 1975 N.M. Laws ch. 332, § 1, currently codified in N.M. Stat. Ann. § 22-1-2(I) (Repl. Pamp. 1981).

The home instruction exception apparently was an afterthought, given the concern in "many circles, i.e. [sic] that anyone could keep his children home and call it a private school." Task Force Letter, Dec. 30, 1974, accompanying final draft of the Task Force's proposed legislation (appended to Record). As a result of this concern, the revised statute permits student attendance at a "private" school with no supervised program of instruction to meet the compulsory attendance requirement, although a "supervised program of instruction," such as the district court found the Edgingtons provided at home, is not deemed sufficient under the statute.

26. 99 N.M. at 719, 663 P.2d at 378.

27. *Id.*

28. 85 N.M. 783, 518 P.2d 272 (1974).

29. *See* Record at 20: "No private school in New Mexico is compelled to seek State accreditation or receive State approval of its programs, its curriculum or its instructor qualifications to operate legally." See also supra note 25 for a discussion of the deregulation of nonpublic education in New Mexico.

the court's reasoning reveals, the court intended to defer to its perception of the policy decision underlying the Legislature's prohibition of home instruction. Its method of scrutiny failed to uncover, however, the mistaken assumption behind the legislative policy. Indeed, the home instruction exception to the definition of a private school can only be sustained if one accepts the validity of this assumption, namely, that parental decisions are invariably adverse to the educational interests of their children.

A. The Home Instruction Exception: The Court's Rationale

1. The Court's Characterization of the Affected Rights

The Edgingtons had characterized the appeal in terms of their parental rights,[30] and the district court had based its equal protection conclusion on the inconsistent effect of the private school definition upon parental rights.[31] The court of appeals, however, reframed this issue, ignoring the parental rights question and focusing instead on the educational rights of the children.[32]

This shift in focus had noteworthy ramifications for the *Edgington* court's decision. The Edgingtons had asserted their parental rights on both due process and equal protection grounds,[33] arguing that the right to direct their children's education[34] implicated fundamental privacy rights[35]

30. State v. Edgington, 99 N.M. 715, 717, 663 P.2d 374, 376 (Ct. App. 1983).

31. *See* Record at 316.

32. *See* 99 N.M. at 718, 663 P.2d at 377. The court's decision to focus on the right of the child, rather than that of the parent, is never explicitly articulated. The citation of San Antonio Indep. School Dist. v. Rodriguez, *supra* note 21, however, can only be explained as manifesting the court's decision to resolve the case by balancing the rights of children against the state's interests. For a further discussion of *Rodriguez*, see *supra* note 21 and accompanying text.

33. 99 N.M. at 717, 663 P.2d at 376. The state appealed solely on the grounds that the home instruction exception did not violate the Edgingtons' equal protection rights. In response, the Edgingtons asserted both substantive due process and equal protection claims. They argued that the statute violated both their first amendment right to the free exercise of religion and their fourteenth amendment right to privacy, manifested as the parental right to direct their children's education. They likewise claimed that the statutory classification in question discriminated against their exercise of the previously asserted fundamental rights, thereby denying them the equal protection of the laws. For a discussion of whether the parental right may be viewed as fundamental, see *infra* notes 34-35.

34. Inasmuch as the court of appeals declined to consider the constitutional scope of the parental right, we have no insight as to the court's perception of this question. The court's reluctance to consider such a question is understandable, if unfortunate. United States Supreme Court case law has discussed the possible scope of the parental right, but has reached no strong conclusion on the subject.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923), enumerated the freedom to raise children as among the liberty interests protected by the fourteenth amendment. Pierce v. Society of Sisters, 268 U.S. 510 (1925), amplified *Meyer* by holding that parents had the constitutionally protected right, subject to reasonable state regulation, to direct the upbringing and education of children under one's control. *Id.* at 534-35. The *Pierce* Court further described the theory encompassing the right as one which

> excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere

and mandated strict judicial scrutiny of the statutory scheme.[36] The court's decision to ignore the parental rights issue left unresolved the Edgingtons' asserted parental rights claims.

Furthermore, the court's reformulation of the issue settled the question of the level of judicial scrutiny applicable to the home instruction ex-

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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.

Id.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944), likewise recognized the existence of the parental right, describing a "private realm of family life which the state cannot enter." The *Prince* Court held, however, that the state's legitimate need to protect the welfare of children overcame claims of both parental and free exercise rights. *Id.*

Wisconsin v. Yoder, 406 U.S. 205 (1972), a case somewhat analogous to *Edgington*, presented the combined free exercise and parental rights claims of a group of Old Order Amish parents who refused to send their children to high school. The Court upheld the parents' first and fourteenth amendment rights to direct the religious training of their children. *Id.* at 234. The Court treated the combination of first and fourteenth amendment claims as implicating fundamental rights and triggering strict judicial scrutiny of Wisconsin's school attendance laws. *Id.* at 233. Read together, *Prince* and *Yoder* suggest that a combined parental right/free exercise claim, such as the Edgingtons', might be deemed fundamental if the claimants established an essential link between their religious beliefs and nonattendance at conventional schools. Yet, even a claim of fundamental stature may not prevail against sufficiently compelling state interests in child welfare. See *infra* note 36 for a discussion of standards of constitutional analysis. Moreover, it is unclear whether the Court would accord fundamental status to a purely secular parental rights claim.

35. No United States Supreme Court case explicitly identifies a parent's right to direct his child's education as a valid manifestation of the constitutionally protected, fundamental right to privacy. Language in the seminal privacy cases, however, suggests that this parental right is a protected expression of family autonomy, one of the valid characterizations of the right to privacy. Griswold v. Connecticut, 381 U.S. 479 (1965), describes parental decisions regarding children's education as protected by the fundamental constitutional guarantees creating a zone of privacy around certain rights. *Id.* at 482-84. Roe v. Wade, 410 U.S. 113, 152-53 (1973), cited with approval the *Griswold* language describing constitutionally protected zones of privacy surrounding fundamental personal rights. Furthermore, the *Roe* Court described such fundamental rights as "hav[ing] some extension to activities relating to family relationships (citing *Prince*); and child rearing and education (citing *Meyer* and *Pierce*). *Id. Roe* makes clear, however, that even fundamental privacy rights may be limited by legislation narrowly tailored to serve compelling state interests with which the rights conflict. *Id.* at 153-54. *Cf. Rodriguez, supra* note 21, at 32-33, stating that only rights explicitly or implicitly included within the Constitution will be deemed fundamental.

36. Judicial review of both due process and equal protection claims takes the general form of a balancing process that weighs individual rights against both state interests and the legislative means for furthering those interests. The balancing process strives to guarantee effective implementation of legislative purpose without undue infringement of personal rights. Yet, courts will weight the balance in favor of either the individual or the state, depending upon the nature of the right or classification burdened by the legislation. Thus, the balancing process requires an initial identification of the right or the class burdened by the legislation. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-56 (1973).

Typically, legislation burdening social or economic interests of a class will be weighted in favor of the state's regulatory interests and presumed valid unless the legislation has no rational relationship to a state goal. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 60 (1982). On the other hand, when a fundamental individual right or suspect classification of persons is burdened, the balance shifts in favor of the individual. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). This so-called strict judicial scrutiny presumes the challenged legislation unconstitutional unless the state can demonstrate that the statute is narrowly tailored or necessary to the furtherance of a compelling state interest. *See, e.g., Roe*, 410 U.S. at 155.

ception. As the *Edgington* court stated, the *Rodriguez* holding that education is not a fundamental right allowed the court of appeals to apply a rational basis test to the challenged statutory classification.[37] Application of that standard requires less scrutiny by the court and usually results in the vindication of the statute.[38] Thus, by applying *Rodriguez* and treating the case as a children's rights case, the *Edgington* court effectively weighted its analysis in the state's favor.

2. The Court's Reformulation of the Rational Basis Test

The district court's order to dismiss the charges against the Edgingtons set out as its standard of review a requirement that the challenged classification bear a "fair and substantial relationship"[39] to a legislative purpose. This test arguably subjected the home instruction exception to more substantial scrutiny than the rational basis test, in view of the perceived importance of the parental right.[40] The court of appeals reformulated this test, however, to inquire only as to the existence of any conceivable state of facts that would justify the statutory classification embodied in the home instruction exception.[41] The *Edgington* court's articulation of the test reflects its decision to forego scrutiny of the rationality of the home instruction exception, based on its expressed policy of extreme judicial deference to legislative classifications.[42]

The court of appeals emphasized a three-fold concern with legislative ends. First, it implied that the rational basis test does not require assertion of *actual* state interests. Instead, the statute was to have been scrutinized in light of any conceivable state interests that the court could have identified.[43] Second, the court required only a minimal showing regarding the legitimacy of identified state interests. The court stated that a legislative purpose will be found to be legitimate if any reasonably conceived state

37. 99 N.M. at 718, 663 P.2d at 377.

38. *See* G. Gunther, *The Supreme Court, 1971 Term—Forward: In Search Of Evolving Equal Protection Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). But see Zobel v. Williams, 457 U.S. 55 (1982), in which the Court struck down an Alaska statute on rational basis grounds.

39. The *Edgington* court's standard of review contrasts sharply with the rational basis test set out in the district court's order to dismiss the charges against the Edgingtons. The court's order described the home instruction exception as "unreasonable, arbitrary, and [without] some ground of difference having a fair and substantial relationship to the objects of the Public School Code." 99 N.M. at 717, 663 P.2d at 376.

40. This approach required both a rational and substantial relationship between legislative purposes and the statutory means of effectuating those purposes. Such a test may reflect the district court's decision to employ a form of intermediate scrutiny. *See* Plyler v. Doe, 457 U.S. 202, 217-18(1982); Craig v. Boren, 429 U.S. 190, 197 (1976). In any case, this formulation reflects the district court's concern with the validity of both legislative ends and means.

41. 99 N.M. at 718-19, 663 P.2d at 377-78.

42. *Id.* at 718, 663 P.2d at 377.

43. *Id.*

of facts will justify it.[44] Finally, the court suggested that its rational basis inquiry would end with identification of valid state ends. The *Edgington* articulation of the rational basis test implies that once the court identifies hypothetical state interests that are not patently illegitimate, legislation touching upon these ends will not be struck down unless there is no correlation whatsoever between the statute and the identified interests.[45] In effect, the court of appeals' interpretation of the rational basis test affords virtually no scrutiny of the relationship between the statutory classification and legitimate legislative goals.

The court of appeals' formulation of the rational basis test allowed it to ignore the district court's clear concern regarding the attenuated relationship between the home instruction exception and any legitimate legislative purposes.[46] The *Edgington* court also disregarded the United States Supreme Court's expressed concern that statutory classifications be truly scrutinized under the rational basis test, in order to ensure that they further identifiable and valid state ends in a rational manner.[47]

Moreover, inasmuch as the Edgingtons raised equal protection issues under both the federal and state constitutions,[48] the court of appeals was bound by the supremacy clause[49] to apply the federal standard of review. The *Edgington* court, however, ignored the United States Supreme Court's contemporary formulations of the federal rational basis test.

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44. *Id.*

45. *Id.* at 719, 663 P.2d at 378.

46. *See, e.g.*, Record at 229.

47. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 235 (1981). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Eisenstadt v. Baird, 405 U.S. 438, 448-55 (1972). Gunther describes the Court's recent attitude toward rational basis scrutiny as follows: "Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of over-inclusive and under-inclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentations is substantially narrowed." Gunther, *supra* note 38, at 20.

The Supreme Court recently demonstrated the contemporary vitality of the realistic rational basis doctrine in Zobel v. Williams, 457 U.S. 55 (1982). The *Zobel* Court invalidated an Alaska statute on rational basis grounds, finding that the challenged classification did not rationally further two state interests and did further a third interest that was not legitimate. *Id.* at 61.

The *Zobel* test scrutinized challenged legislation in three ways. The test required asserted state ends to be legitimate, to be furthered by the discriminatory classification, and to be thus furthered in a reasonable manner. *Id.* at 60. Within the context of minimal scrutiny, such a standard actively reviews the constitutional validity of both legislative ends and means. Moreover, the standard assures that when legislation discriminates against individual rights of a group, it does so in a manner that is relevant to classifying traits requiring discriminatory treatment in order to achieve a legitimate purpose for the common good. *Id.* at 70 (Brennan, J., concurring).

48. 99 N.M. at 718, 663 P.2d at 377.

49. *See* U.S. Const. art. VI, § 2: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

3. The Court's State Interest Analysis

Application of its overly deferential rational basis test enabled the *Edgington* court to conceive of two state interests to justify the home instruction exception.[50] The court of appeals described the first of these interests in terms of preventing parents from using home instruction as a pretense for avoiding consequences of the truancy laws.[51] The court accepted the plausibility of the Legislature's fear that parents would seize upon the deregulation of nonpublic schools as an excuse to keep children out of school altogether, on the grounds that the children were attending a "private school" at home.[52]

The court described its second state interest in terms of assuring the adequate growth and development of children.[53] The court stated that the Legislature might have adopted the home instruction exception out of a belief that removal of children from their homes for education[54] was necessary to assure proper intellectual, social, and vocational growth.[55] The court concluded that its identified interests were legitimate, and declared that the means for effectuating these interests, embodied in the home instruction exception, were rationally related to them.

4. The Relationship Between the Home Instruction Exception and the Identified State Interests

Objective assessment of the means by which the Legislature chose to further its educational goals[56] suggests that in fact the home instruction exception is not sufficiently related to the ends with which it was associated to survive equal protection scrutiny. The court of appeals correctly

50. 99 N.M. at 719, 663 P.2d at 378. The court correctly placed its analysis within the context of *Santa Fe*, which held state supervision and control of nonpublic schools unconstitutional. 85 N.M. 783, 785, 518 P.2d 272, 274 (1974). *See also* Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975). *Prince* interprets state control to mean "control over the curriculum, disciplinary control, financial control, administrative control, and, in general, control over all of the affairs of the school." *Id.* at 554, 543 P.2d at 1182. *Santa Fe* suggests that, while the constitutional grant of power to the State Board of Education [hereinafter referred to as the Board] did not extend to nonpublic education, the Legislature's police power might reach nonpublic schools. 85 N.M. at 784, 518 P.2d at 273. Furthermore, an Attorney General's opinion indicates that the Board's authority over private or public schools is dependent upon legislative enactment. 77 Op. Att'y Gen. 6 (1977). The New Mexico Legislature has given the Board statutory power only to approve courses of instruction when requested to do so by a private school. *See* N.M. Stat. Ann. § 22-2-2(F), (J) (Repl. Pamp. 1981). The Board's constitutional grant of jurisdiction over nonpublic schools extends solely to verification of student attendance. *See* N.M. Const. art. XII; N.M. Stat. Ann. § 22-2-2(L) (Repl. Pamp. 1981).

51. 99 N.M. at 719, 663 P.2d at 378.

52. See *supra* note 25 for a discussion of this issue.

53. 99 N.M. at 719, 663 P.2d at 378.

54. *Id.*

55. *Id.*

56. *See supra* text accompanying note 47.

assumed that the opposite of truancy is educational activity, rather than mere custodial attendance at a location other than a student's home. Yet, the private school definition, read in conjunction with the Compulsory School Attendance Act,[57] suggests that custodial presence at an unaccredited private school[58] will fulfill the state's compulsory attendance requirement. Such attendance clearly constitutes no guarantee of education.

At the same time, the home instruction exception precludes a parentally supervised curriculum, administered at home, from fulfilling the attendance requirement. Such a categorical rejection of home instruction leaves no room for inquiry as to the quality of the educational experience provided by the parents. In this case, the Edgingtons demonstrated to the satisfaction of the district court that they were providing their children with an education that was academically sufficient.[59] Thus, if the home instruction exception is not irrelevant to the state's interest in preventing truancy, it is at least not rationally related to that objective when a further provision of the Public School Code—satisfied in this case[60]—adequately protects the state's interest in ensuring that children actually receive an education when taught at home.

Moreover, the Compulsory School Attendance Act contains explicit procedures for preventing truancy.[61] These procedures, which basically include notice and the possibility of adversarial judicial proceedings, are directly related to verification and elimination of actual incidents of truancy. The *Edgington* court presumptively related the flat prohibition of home instruction to elimination of parentally approved truancy.[62] Yet, in contrast to the state's compulsory attendance provisions, the exception is clearly attenuated in its relation to assurance of education.

The state's interest in supervision of child development has a similarly attenuated relationship to removal of children from their homes for edu-

57. N.M. Stat. Ann. § 22-1-2(I) (Repl. Pamp. 1981); *id.* at § 22-12-2(B) (Cum. Supp. 1983).

58. See *supra* note 50 for a discussion of this issue.

59. 99 N.M. at 717, 663 P.2d at 376; N.M. Stat. Ann. § 22-1-2(S) (Repl. Pamp. 1981). The district court's finding that the Edgingtons provided their children with a supervised program of instruction was based on examination of curriculum materials provided to the Edgingtons by the Christian Liberty Academy, testimony by Mr. and Mrs. Edgington, and production of the children's pre- and post-test scores on the Iowa Test of Basic Skills. Record at 79-104, 140-42. Test scores indicated that, during the academic year 1981-82, both Jason and Laura Edgington had gained between one and three years in each of the academic areas tested. Respondents' Exhibits D, E (appended to the Record).

60. 99 N.M. at 718, 663 P.2d at 377. The district court found that the Edgington children had attended a school within the meaning of N.M. Stat. Ann. § 22-1-2(S) (Repl. Pamp. 1981), namely, "any supervised program of instruction." This finding reflects the district court's view that the children had satisfied the state's compulsory attendance requirement. It is questionable, however, whether the holding of *Santa Fe* would permit continued application of § 22-1-2(S) to any nonpublic education, including home instruction. *See supra* notes 17 and 25.

61. *See supra* note 8.

62. *See supra* note 25.

cational purposes. To the extent that the home instruction exception requires the removal of children from their homes in order to assure them the opportunity to receive an academically competent education,[63] it stands in stark contrast to *Santa Fe*. The *Santa Fe* decision makes clear that New Mexico tolerates exposure of children to private educational experiences of both unknown and unregulated quality. In light of the policy of *Santa Fe,* the home instruction exception cannot rationally stand on the asserted state interest in the guarantee of the child's educational experiences.

Finally, given the state's educational interests in preventing truancy and supervising child development, the internal structure of the private school definition is itself arbitrary and unreasonable. The definition directs the state to remove children from their homes, ostensibly to assure attendance at a "school" where someone other than a parent will verify their attendance and monitor their academic progress. The private educational environment to which the attendance law permits a child's removal, however, is one over which the state has abrogated all supervision and control beyond verification of attendance.[64] The private school definition thus guarantees total state deregulation of all nonpublic education *except* parental home instruction, which the state regulates by way of prohibition.

B. The Home Instruction Exception and the Legislature's Assumption

The court of appeals correctly interpreted the home instruction exception in light of a legislative assumption of adversity of interest between parents and children. The court's interpretation, however, raises important questions as to the origin and legitimacy of that assumption.

The legislative assumption undoubtedly followed the *Santa Fe* decision and subsequent recommendations to the Legislature regarding a constitutional approach to nonpublic school law.[65] *Santa Fe* precluded state constitutional jurisdiction over nonpublic schools beyond verification of student attendance.[66] Yet, the Legislature disregarded the *Santa Fe* court's observation that the state could regulate nonpublic education pursuant to its police power to act for the general welfare of the state's citizens.[67] The unexamined implication that any regulation of nonpublic education was beyond its power led the Legislature to equate private education with

63. *See supra* note 59.

64. *See supra* note 50.

65. *See supra* note 25 and accompanying text.

66. *Id.*

67. The *Santa Fe* court stated: "However, the Board may exert such authority in the supervision and control of private schools as is conferred by the legislature in the proper exercise of State police power." 85 N.M. at 784, 518 P.2d at 273. *See also* 77 Op. Att'y Gen. 6 (1977).

unsupervised education. This assumption led in turn to the Legislature's inference that total deregulation of nonpublic education would induce some parents to keep children out of school altogether under the pretense of conducting a "private school" at home.[68] Such parental action would clearly be adverse to the educational interests of those children.

The assumptions culminating in the home instruction exception reflect a laudable concern with provision for the educational needs of children. These assumptions are, however, mistaken. As a matter of law and policy, parents are presumed to act in the best interests of their children.[69]

This presumption is reflected in the policy statement drafted by the State Department of Public Education's Task Force on Nonpublic Schools, which views interests of state and parent as acting in a complementary manner to facilitate the educational interests of the child.[70] Such a policy indicates that state, parent, and child act together in making decisions most appropriate to the achievement of their collateral interests in the child's education.[71] The adversarial relationship posited by the New Mexico Legislature is thus inconsistent with the policy position articulated by

68. Such an inference was undoubtedly encouraged by the concern of Task Force members with parentally approved truancy. *See supra* note 25.

69. Language in Parham v. J.R., 442 U.S. 584 (1979), suggests as follows:

> [t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . The statist notion that governmental power should supercede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Id. at 602-03.

70. 99 N.M. at 719, 663 P.2d at 378. The Position Paper defines the relative interests of parent, child, and state as follows:

> *State*
>
> 1. To guarantee to each child the opportunity of obtaining an "education" of his choice (in a formal sense).
>
> 2. To protect children from becoming wards of the State.
>
> 3. To encourage the development of self-reliant and responsible citizens.
>
> *Parent*
>
> 1. To supervise the total physical and intellectual development of his child *as he sees fit* (emphasis added).
>
> 2. To have access to means for accomplishing the first interest.
>
> *Child*
>
> 1. To become self-fulfilled and self-reliant.
>
> 2. To have a supportive environment for achieving the first interest.

Position Paper, *supra* note 25, at 3.

71. *See* E. S. Mondschein & G. P. Sorenson, Home Instruction In Lieu Of Compulsory Attendance: Statutory And Constitutional Issues (Nov. 1982) (paper presented at the national convention of the National Organization on Legal Problems and Education). The authors read relevant Supreme Court decisions, coupled with common law doctrine, as supporting the proposition that "parents and the state have shared rights and responsibilities with regard to the education of children, and that within reasonable state guidelines, the parents may select the educational alternative that meets their needs." *Id.* at 12.

the Task Force, as well as with the legal presumption of unity of interests among parent, child, and state.[72] By upholding the home instruction exception, the court of appeals tacitly approved the Legislature's incorrect assumption regarding adversity of educational interests as between parent and child.

IV. CONCLUSION

State v. Edgington commends the Legislature to a more careful reading of *Santa Fe* and its suggestion that the state exercise its inherent police power to regulate nonpublic education. Such an exercise would serve two useful functions. Minimal regulation of nonpublic education would ensure that all educational programs in fact afford children an adequate education. Moreover, statutory permission of parental home instruction, accompanied by state regulation parallel to that of private schools,[73] would abrogate the contradictory effects of the current private school definition and further the educational interests of all children, as well as those of their parents and the state.

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72. *See* Stocklin-Enright, *The Constitutionality Of Home Education: The Role Of The Parent, The State And The Child*, 18 Willamette L. Rev. 563, 578 (1982). In regard to the presumption that parents act in their children's best interests, Stocklin-Enright argues (a) that the state has a surveillance interest in ensuring that parents act to meet their child's educational needs and that (b) this interest is secondary to the parents' interest in facilitating their child's educational interests. Stocklin-Enright also posits viewing the tripartite allocation of educational interests according to a trust model of decision-making, whereby parents and state act, in effect, as trustees of the body of children's rights and interests which constitutes the corpus of the trust. *Id.* at 584-86.

73. *See* Mondschein & Sorenson, *supra* note 71, at 4, who stated in November 1982 that 26 states permit some form of home instruction. The authors list the following as criteria a state may wish to consider when evaluating the adequacy of a home instruction program: (a) hours of instruction equivalent to those required by public schools, (b) the competence, diligence, and good faith of parties instructing the children, (c) adequacy of materials, texts, methods, and procedures, and (d) periodic state testing of the children enrolled in home instruction programs to monitor educational progress and ensure that minimal educational standards are being maintained. This list is cited in the Massachusetts case of Perchemlides v. Frizzle, No. 16641, slip op. at 28 (Hampshire, Mass. Super. Ct. Nov. 13, 1978).