Conscientious Objection to Public Education: The Grievance and the Remedies

Charles E. Rice

Notre Dame Law School, charles.e.rice.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Education Law Commons, and the Religion Law Commons

Recommended Citation


Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/53

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
Conscientious Objection to Public Education: The Grievance and the Remedies

Charles E. Rice*

"This is a quiet place," said John Fink, an 18-year-old senior at Norfolk Christian School in Norfolk, Va. "The Lord helps us work things out."

The hallways of Norfolk Christian are lined with student lockers that have no locks. A sign at one entrance reads, "This is my Father's world." Across the street is a public school, its pupil ranks thinned by the growing enrollments of private schools like Norfolk Christian.¹

An estimated 4,804,000 children—9.8% of the total elementary and secondary school enrollments—attended nonpublic schools in 1976. Of these children, 86% were enrolled in church-related schools.² The most notable development in this area has been the rapid growth of so-called Christian schools.³ "A Christian school," said Pastor Levi Whisner, a party in one of the leading court cases in the area, "has a Bible-oriented curriculum, Bible standards and a Christian atmosphere, a born-again true Christian leadership with Bible discipline."⁴ At these schools, students are exposed to a learning environment that is considerably more conservative and narrow than the environment found at most older, more traditional church schools. There are absolute disci-

---


² The author would like to thank the Institute on Law, Religion and the Family of the Lincoln Center for Legal Studies, Inc., 1629 K Street, N.W., Washington, D.C., for assistance in the research and preparation of this Article. The opinions expressed, however, are entirely those of the author.


² Catholic schools accounted for approximately 65% of the nonpublic school enrollment. The Catholic share of that enrollment continues the decline it has experienced over the past decade, although the rate of the decline has slowed. Inform, May 1978, at 4 (published by the Center for Independent Education, Menlo Park, California); N.Y. Times, Mar. 25, 1978, at 22, col. 4.

³ According to Paul A. Kienel, executive director of the Association of Christian Schools International, "Two new schools are opening around the country every day." N.Y. Times, Apr. 28, 1978, at A1, col. 3. In 1976 there were approximately 5,000 such schools in the nation. Id. There were 106,547 nonpublic elementary and secondary schools in the nation in 1976. Inform, May 1978, at 4 (published by the Center for Independent Education, Menlo Park, California); N.Y. Times, Mar. 25, 1978, at 13, col. 3.


pline, neat grooming, heavy concentration on educational basics
and constant reiteration that, as was written in Proverbs 1:7,
"The fear of the Lord is the beginning of knowledge." There are
no avant garde text books sprinkled with scatological phrases.
There is prayer before lunch, and sometimes before math.6

The Christian school movement is the logical outgrowth of
the dissatisfaction of some parents, particularly some fundamen-
talist Baptists, with what they regard as excessive secularism in
the public schools.7 The controversy has already produced some
definitive litigation,8 but much remains unsettled. On the one
hand, public authorities contend the public school is truly neutral
toward religion. Compulsory attendance laws and other regula-
tions by the state of private education are seen as legitimate
measures, pursuant to the police power, to achieve a minimal
level of intellectual and civic competence among the young. On
the other hand, objecting parents and pastors regard the public
schools not as a religious and authentically neutral, but rather as
centers for the promotion of a competing faith. That faith,
usually called secular humanism or some variant thereof, is re-
garded by them as destructive of the religious faith of their chil-
dren and students. When parents withdraw their children from
public schools, they see the state's regulation of their Christian
schools as an effort to deprive those schools of their authentic
Christian character. In their tactics of confrontation, they are
much more implacable than the supporters of traditional private
and parochial schools.

The purpose of this Article is to examine the claims of Chris-
tian and other parents who object to what they see as an improper
religion of secularism in the public schools; to evaluate the reme-
dies available to those parents; and to inquire as to how, if at all,
their legitimate interests and those of the state can be reconciled.

I. THE NATURE OF THE CONTROVERSY

Unfortunately the issues involved in the public education
and religion conflict are often obscured by a failure to consider
public education in its historical context. In that context, reli-

7. Id. at col. 3. Racial segregation does not appear to be a major motivation in the
founding of these schools, many of which are racially mixed. Id. at col. 4.
8. See, e.g., Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.
App. 3d 1, 124 Cal. Rptr. 68 (1975); Hobolt v. Greenway, 52 Mich. App. 682, 218 N.W.2d
98 (1974). See also Note, Freedom of Religion and Science Instruction in Public Schools,
87 YALE L.J. 515 (1978); Annot., 82 A.L.R.3d 579 (1978) (validity of sex education pro-
grams in public schools).
gious controversies over the public schools are nothing new. Never-theless, comparatively recent, well-publicized constitutional decisions have certainly served to exacerbate the resentment felt by religiously inclined parents toward the orientation of the public schools. This Section will examine the historical origins of the conflict and the issues upon which the battlelines of the present controversy have been drawn.

A. Education and Religion in Historical Perspective

Elementary and secondary education in the United States was private and religious in its origin and it bore a concededly religious stamp for much of its history, even after the state assumed the role of educator. In the colonial period, schooling was essentially a function of the church. Where a particular religion was established as the official religion of the colony, as in Puritan New England, the church schools enlisted state support. They were “sectarian public schools, where the public supported a single established religion and where dissenters’ schools were not allowed to function.” The elementary school in Dutch New Netherland, for example, has been accurately described as “a public parochial school” that never failed to teach the catechism. The main purpose of such education was to train children in the principles of the Dutch Reformed religion. When the English took over that colony, the New York schools continued to be church-controlled, whether Dutch Reformed or Anglican.

9. The situation has been characterized as follows:

Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.

The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of “one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures.”

13. See id. at xiv; 3 C. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 564 (1906).
first public school law in the colonies, the "ould deluder" statute enacted by Massachusetts in 1647, required every town of more than fifty householders to provide a schoolmaster to teach the children to read the scriptures.\textsuperscript{14} 

The religious character of the schools, including those with public support, generally continued into the post-Revolutionary period.\textsuperscript{15} The Northwest Ordinance, adopted by the Continental Congress in 1787 for the governance of the Northwest Territory, reflected this when it proclaimed, "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."\textsuperscript{16} In 1795, An Act for the Encouragement of Schools appropriated twenty thousand pounds for the support of New York elementary schools including "the several charity schools."\textsuperscript{17} In New York City, most of the elementary schools were such church-related "Charity Schools."\textsuperscript{18} Other examples could be cited to show that this was an age of sectarian public education.\textsuperscript{19} 

Interest in public education began to grow in the 1830's and 1840's.\textsuperscript{20} This period saw the emergence of Horace Mann as the

\textsuperscript{14} See 2 A. Stokes, Church and State in the United States 50 (1950).
\textsuperscript{15} The Massachusetts Constitution of 1780, for example, provided:

As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality:

Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

\textsuperscript{16} 32 Journals of the Continental Congress 334, 340 (R. Hill ed. 1936) (editors marks deleted), reprinted in 1 Stat. 51 note (a) (1789).
\textsuperscript{17} 1795 N.Y. Laws, ch. 75; see also Graves, Development of the Education Law in New York, in 16 N.Y. Educ. Law (McKinney) at xiv (1969).
\textsuperscript{18} See E. Connors, supra note 12, at xv; 6 New York State Constitutional Convention Committee Report 229-30 (1938).
\textsuperscript{19} See 2 A. Stokes, supra note 14, at 52-54.
\textsuperscript{20} One author summarized the factors that promoted this increased interest.

Such were the popular Democratic presidential administrations (1829-1837) of Andrew Jackson (1767-1845); the gradual freeing of the suffrage from property qualifications; the large immigration of European laborers ignorant of English and of our democratic traditions; the rapid growth of urban industrial centers; and the need of providing schools in the newly settled states of the Middle West. These and other factors attracted national attention to the problem of education in the second quarter of the nineteenth century. It was realized that the Churches
leading crusader for nonsectarian public schools in which the great "common truths" of Christianity would be taught. One reason for the success of his movement was the fear that, if the publicly supported schools remained sectarian, the growing numbers of Roman Catholics would impress upon the schools the creed of Catholicism.\(^2\) The public or common school envisioned by Horace Mann was nonsectarian, but not in the same way we would use that term today. While the special orthodoxies of particular creeds were excluded, the Bible was regarded as so basic as to be itself nonsectarian. In practice, the public schools under Mann's concept incorporated into their teaching a common denominator Protestantism anchored on scripture.\(^2\)

Not all Protestant denominations accepted Horace Mann's view of the public school, however. The Lutherans, who maintained the largest denominational school system in Pennsylvania before the advent of public schools, supported a petition in 1834 and privately endowed or supported institutions were entirely inadequate for the task. Massachusetts took the lead in the resulting movement for greatly strengthening the public schools and for making attendance at some school obligatory for all children of certain ages.

2 A. Stokes, supra note 14, at 53-54.
21. Professor Boles has elaborated as follows:

The period from 1830 through the 1840's saw not only an increase in the number of Protestant sects, but an enormous influx of Roman Catholic immigrants. The fear that early Catholic opposition to Bible reading and other Protestant practices in the public schools would lead to Catholic domination led to open and at times violent hostility toward Roman Catholics. Debates over the efficacy of Bible reading became increasingly common during this time, and the extreme Protestant opposition to the Catholic viewpoint finally crystallized in the Know-Nothing political movement which was organized officially as a party in 1853. During this period of strife, Horace Mann, the father of the public school system in America, emerged as the great crusader against sectarianism in the public schools.

D. Boles, supra note 10, at 23 (footnote omitted).
22. As Mann explained it:

The use of the Bible in schools is not expressly enjoined by the law, but both its letter and its spirit are in consonance with that use; and as a matter of fact, I suppose there is not, at the present time, a single town in the Commonwealth in whose schools it is not read. Whoever, therefore, believes in the Sacred Scriptures, has his belief, in form and in spirit, in the schools; and his children read and hear the words themselves which contain it. The administration of this law is entrusted to the local authorities in the respective towns. By introducing the Bible, they introduce what all its believers hold to be the rule of faith and practice; and although, by excluding theological systems of human origin, they may exclude a peculiarity which one denomination believes to be true, they do but exclude what other denominations believe to be erroneous. Such is the present policy of our law for including what all Christians hold to be right, and for excluding what all, excepting some one party, hold to be wrong.

2 A. Stokes, supra note 14, at 56 (emphasis in original).
calling for the repeal of the free school law. Similarly, the Missouri Synod of Lutherans insisted on the importance of denominational schools from the time of the first German immigration to the Midwest in the late 1830's. 23 Strong Episcopal opposition to the public or Common School Movement led to a renewed emphasis on the establishment of Episcopal parochial schools in the 1840's and 1850's. 24 The Presbyterian resistance to the Common School Movement was even stronger. Dr. Charles Hodge, an influential Presbyterian leader, assailed the common schools as "positively anti-Christian." He declared that parochial schools were essential to an adequate education and that they were entitled to public funds. To deny such funds to them, he charged, was "unjust and tyrannical." 25

Quite naturally, Roman Catholics opposed the generalized Protestant influences in the common schools. When the Common Council of New York City rejected the Catholic request for public funds for parochial schools, Bishop John Hughes launched a campaign to remove the common schools from the control of the Protestant-dominated Public School Society and place them under the control of an elected board of education which would run them as secular schools. In those public schools, he said,

let religion in every shape and form be excluded. Let not the Protestant version of the Scriptures, Protestant forms of prayers, Protestant hymns, be forced on the children of Catholics, Jews, and others, as at present, in the schools for the support of which their parents pay taxes as well as Presbyterians. 26

The Catholic position prevailed in the state legislature in 1842. 27 In other cities as well, Catholics opposed the use of the King James Bible and other Protestant influences in the common schools. 28

The intensity of feeling aroused by this issue is difficult for us to appreciate at this distance. When young Tom Wall, a Catholic, refused to recite in public school from the Protestant version of the Bible, he was beaten by his teacher with a rattan stick for thirty minutes until he submitted. His punishment was upheld by a Boston court, which found it to be "no interference with

24. Id. at 409.
25. Id.
27. See 1842 N.Y. Laws, ch. 150, § 14.
religious liberty.\textsuperscript{29} The distressing experience of Tom Wall demonstrates it is nothing new to claim the public schools are promoting religious beliefs contrary to the religious rights of pupils and their parents.

In reaction to Catholic efforts to remove "common denominator" Protestant influence from the public schools, Protestant support for those schools increased. The resolution of the controversy in the years following the Civil War was that public funds would not be used for parochial schools of any denomination, but the public schools would retain their common denominator Christianity with Bible reading at least encouraged and, if possible, required.\textsuperscript{30} This condition continued through the late nineteenth and the early twentieth centuries. The decades of the 1930's and 1940's, however, saw a rise in opposition on the part of secularists and others to such theistic manifestations in public schools.\textsuperscript{31} In the 1960's, this opposition prevailed with the elimination of prayer, Bible reading, and other theistic practices from public schools.\textsuperscript{32}

\textbf{B. Issues in the Current Conflict}

Today, Christian parents' main objections are to what they regard as manifestations of a secular religion in the public schools. Like those parents who in the past objected to Bible reading, some objecting parents assume that their objective is to keep all religious influence out of public education. To this end, they sometimes use the rhetoric of neutrality that was used against them in the recent past. It is clear, however, from the development of American public education, that its neutrality was only of a limited sort during its period of common denominator Protestantism. Now that Supreme Court decisions have re-

\textsuperscript{29} Commonwealth v. Cooke, 7 Am. L. Reg. 417, 423 (Boston, Mass., Police Ct. 1859). See also Donahoe v. Richards, 38 Me. 376 (1854) (upholding the expulsion of a Catholic child from a public school for refusal to read in class the Protestant version of the Bible).

\textsuperscript{30} 2 A. Stokes, supra note 14, at 69-71; Jorgenson, supra note 23, at 413. The Blaine Amendment, proposed in 1875 by President Grant, reflected this solution. The Blaine Amendment never received the necessary two-thirds majorities in Congress and therefore was never referred to the states for ratification. Nevertheless, similar provisions were incorporated in the constitutions of 29 states between 1877 and 1917. See D. Boles, supra note 10, at 30-32; 4 Cong. Rec. 175, 205, 6453 (1875-1876); Proposed Amendments to the Constitution, H.R. Doc. No. 551, 70th Cong., 2d Sess. 182 (1928); A. Stokes & L. Pfeffer, Church and State in the United States 272 (1964); C. Zollman, American Church Law 75-76 (1933); Meyer, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951).


moved those Protestant manifestations from the schools, the
question is presented whether the newly required secular atmos-
phere is itself religious. If one concludes that it is, then the ques-
tion arises whether a truly neutral school, in religious terms, is
possible at all.

In a sense, education, like jurisprudence, is an exercise in
"ultimatology."

At least on the elementary and secondary
levels, every educational enterprise would seem to involve a
choice—whether explicit or implicit—of an ultimate criterion, a
choice of a god, as it were. This position is strongly maintained
by some theoreticians as well as activists in the contemporary
Christian school movement.

If elementary and secondary edu-
cation truly has an inherent religious character, a serious question
is presented as to the legitimacy of state-conducted public educa-
tion itself in light of the establishment and free exercise clauses
of the first amendment: If education is intrinsically religious, how
could the state's assumption of the role of educator be consistent
with the neutrality mandate of the establishment clause as pres-
ently interpreted?

The immediate issue in the current controversy, however, is
the validity of the objecting parents' claim that the public
schools, whether or not they could ever be religiously neutral, are
in fact now engaged in the constitutionally illicit promotion of a
secular religion. The validity of this claim hinges upon the recent
expansion by the Supreme Court of the constitutional definition
of religion, for establishment clause purposes, so as to include
nontheistic as well as theistic creeds.

1. Evolving first amendment concerns

The religion clauses of the first amendment provide
"Congress shall make no law respecting an establishment of reli-
gion, or prohibiting the free exercise thereof . . . ." The estab-
lishment clause was intended to prevent the establishment by
Congress of a favored sect, "a possibility which those states with
establishments of their own . . . probably regarded with fully as
much concern as those which had gotten rid of their establish-

33. See Barrett, A Lawyer Looks at Natural Law Jurisprudence, Natural Law Insti-
34. See State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); A. Grover,
Ohio's Trojan Horse (1977); R. Rushdoony, The Messianic Character of American
35. U.S. Const. amend. I, cls. 1, 2.
ments." But the first amendment, while designed to prevent such an establishment by Congress, was not designed to prevent Congress from promoting theism and even a generalized Christianity. As Justice Joseph Story put it:

Probably at the time of the adoption of the Constitution, and of the [first amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship . . . .

The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

The controlling mandate of the establishment clause was therefore neutrality among all religions. But this did not exclude a power in Congress to encourage belief in God or even in a generalized Christianity. The key to this meaning of establishment clause neutrality is the definition of religion. As originally intended in the establishment clause, "religion" connoted some form of a belief in God. Thus, government could be neutral as among all religions, so construed, while still promoting a belief in God. In 1890, the Supreme Court noted in dictum that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." This meaning was expressed by Chief Justice Hughes in 1931:

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in a supreme allegiance to the will of God.

38. Among the many illustrations of this is the fact that, on Sept. 25, 1789, the day after it approved the first amendment, Congress called on President Washington to proclaim "a day of public thanksgiving and prayer" to acknowledge "the many signal favors of Almighty God." I Annals of Cong. 913 (Gales & Seaton eds. 1789); see C. Rice, The Supreme Court and Public Prayer 27-50 (1964).
Under the original meaning of the establishment clause, therefore, nontheistic creeds were simply not religions. At the same time, however, atheism, agnosticism, and other nontheistic beliefs were fully protected by the clause protecting the free exercise of religion. An atheist was as fully entitled to the free exercise of his belief as was a Baptist or a Presbyterian; but the atheist could not complain under the establishment clause if Congress encouraged theistic or even Christian beliefs without preferring any particular sect or combination of sects.

As time moved on, however, the American people changed. As Justice Brennan observed in 1963:

[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.\(^4^1\)

Today, the term “religion” in the establishment clause has been broadened to include nontheistic creeds. In *Torcaso v. Watkins*\(^4^2\) in 1961, the Supreme Court, striking down a Maryland requirement that a state official must declare his belief in God, defined nontheistic beliefs as religions:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and *neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*\(^4^3\)

In a footnote to the last quoted clause, the Court stated, “Among religions in this country which do not teach what would commonly be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”\(^4^4\)

While the *Torcaso* holding could be explained as a traditional free exercise clause protection of the rights of an unbelieving aspirant to state office, the *Torcaso* definition of religion was adopted for establishment clause purposes in the 1963 case that


\(^{43}\) Id. at 495 (emphasis added) (footnote omitted).

\(^{44}\) Id. at 495 n.11.
ruled unconstitutional the recitation of the Lord's Prayer and the reading of the Bible in public schools. It is therefore clear the neutrality mandate of the establishment clause requires that government maintain neutrality not merely among Christian sects while encouraging theism or a generalized Christianity, but between the two great classes of religions, those that acknowledge God and those that do not. Under this criterion, any factual affirmation by government of the truth of theism would be unconstitutional. Only if such affirmations are merely symbolic or ceremonial may they be sustained. In line with this requirement, the courts have generally invalidated the inclusion of prayers in the public school day. Theoretically, it would be a violation of the establishment clause for a teacher or other public official to affirm as a fact that the Declaration of Independence is true when it affirms the existence of God.

46. Incidentally, the Supreme Court's interpretation that the first amendment requires neutrality between theism and nontheism would have only a limited impact on public education were it not for the strict application of the Bill of Rights, including the first amendment religion clauses, against the states. See Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963). While practically all state constitutions contained provisions similar to the Bill of Rights, their interpretation was originally not a federal question. See R. BERGER, GOVERNMENT BY JUDICIARY 135-36 (1977). Even the doctrine of incorporation, as first enunciated, would probably have left to the states the questions involved in Engel v. Vitale, 370 U.S. 421 (1962), and Abington School Dist. v. Schempp, 374 U.S. 203 (1963), since the process formerly applied only to those protections of the Bill of Rights "implicit in the concept of ordered liberty," particularly notions of due process. See Palko v. Connecticut, 302 U.S. 319, 325 (1937). See also De Jonge v. Oregon, 299 U.S. 353 (1937); Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925); Twining v. New Jersey, 211 U.S. 78 (1908). But now, with almost all Bill of Rights provisions strictly applied to the states, the range of permissible state policies is much narrower.

When Christian parents object to what they regard as secularistic tendencies in the public schools, they are therefore contending not only against the broadened mandate of the first amendment, which requires neutrality between theism and nontheism, but also against the strict incorporation doctrine under which that neutrality is fully required of the states and local governments. Moreover, those combined doctrines operate to restrict any subsidies and benefits the states might otherwise extend to private schools of a religious character. See Gaffney, Postscript: Meek, Wolman, and the "Fear of Imaginable but Totally Implausible Evils" in the Funding of Nonpublic Education, in FREEDOM AND EDUCATION: PIERCE v. SOCIETY OF SISTERS RECONSIDERED 79-93 (1978).

47. See Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962). In Schempp, Justice Brennan commented that the words "under God" in the revised Pledge of Allegiance are not necessarily unconstitutional because they "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'" 374 U.S. at 304.
Pursuant to this neutrality mandate, public schools must not only avoid prayers and other affirmations of the existence of God but they must maintain a less clearly defined neutrality as well on moral questions. Thus, while a course on sex education may constitutionally present different moral views to the pupils, it may not present God’s law as a binding criterion and it may not advance any of the contradictory views as morally preferable. The question arises, of course, as to whether this suspension of judgment on the existence of God or on a moral issue is itself an implicit promotion of a secularist and relativist religion.

The mere fact that the public school’s treatment of a given issue happens to coincide with the tenets of a particular religion does not mean the school is promoting that religion. Thus, the Catholic Church condemns bank robbery and so does the public school. But that does not make the public school an instrumentality of the Vatican. Proof of the argument that the public school is promoting a religion of secularism requires more than a mere coincidence of positions between the school and the secularist creed. Rather, the argument depends upon whether a nonjudgmental, secular treatment of an issue (abortion, for example) necessarily involves an affirmation, expressly or by studied exclusion, of the irrelevancy of the supernatural. It then must be asked whether to affirm the irrelevancy of the supernatural is necessarily to favor the position of Secular Humanism or some other secular religion.

2. Secular religion and the public schools

The Supreme Court, in Torcaso v. Watkins, properly described Ethical Culture and Secular Humanism as religions.

---

51. The New York Society for Ethical Culture articulated its basic philosophy: The Society for Ethical Culture was founded in the Spring of 1876 by Dr. Felix Adler. Its adherents maintain that the true test of religious consecration must be what men do for one another in their day-by-day living to achieve mutually creative and liberating relationships. Drawing inspiration and guidance from the great men in every age, this religious and educational fellowship, respecting the dignity and worth of every individual, seeks to develop ethical values in human relations. Without formal creed, it dedicates itself “to the ever increasing knowledge and practice and love of the right.

52. Secular Humanism has been described as a faith in people, in all humanity, and in science as a means of attaining truth.
They are similar in their effort to interpret life without reference to the supernatural. In this respect they are inconsistent with theistic religions, including the faith held by many of the Christian parents opposed to public education today. In 1933, Humanist Manifesto I, a statement of secularist beliefs, was issued by a group of public figures, including John Dewey, the educational philosopher. In 1973, an updated and similar Humanist Manifesto II was issued by 120 religious leaders, philosophers, social scientists, and others.\footnote{Humanist Manifesto II is useful here for its demonstration of the practical as well as theoretical inconsistency between the Humanist position and the Christian faith, which includes an affirmation of absolute truths derived from divine revelation. The manifesto proclaimed:}

We believe that traditional dogmatic or authoritarian religions that place revelation, God, ritual or creed above human needs and experience do a disservice to the human species.

Promises of immortal salvation or fear of eternal damnation are both illusory and harmful. They distract humans from present concerns, from self-actualization and from rectifying social injustices.

We affirm that moral values derive their source from human experience. Ethics is autonomous and situational, needing no theological or ideological sanction. Ethics stems from human need and interest. To deny this distorts the whole basis of life.

We strive for the good life, here and now.

In the area of sexuality, we believe that intolerant attitudes, often cultivated by orthodox religions and puritanical cultures, unduly repress sexual conduct. The right to birth control is also a quest for the ethical and spiritual values of life through philosophy, science, the arts, and literature. Humanists in general are not interested in supposedly supernatural phenomena nor in conventional religion and they are opposed to any form of authoritarian control. Most of them are individually active in expressing these ideas in some form of social action or education that promotes human dignity and enriches the content of life on earth.


\footnote{The signers included Andrei D. Sakharov, the dissident Russian physicist; Paul Blanshard, a leading proponent of the separation of religion from the state; Professor Sidney Hook of New York University; Dr. Francis Crick, the discoverer of the structure of the DNA molecule; Dr. Alan Guttmacher, president of the Planned Parenthood Federation of America; Lawrence Lader, chairman of the National Association for Repeal of Abortion Laws; Professor B.F. Skinner of Harvard University; Jerome Nathanson, chairman of the New York Society of Ethical Culture; Vashti McCollum, the plaintiff in \textit{McCollum v. Board of Educ.} and former president of the American Humanist Association; Professor Chaim Perelman of the University of Brussels; and others. \textit{N.Y. Times}, Aug. 26, 1973, at 1, col. 3.}
trol, abortion and divorce should be recognized. While we do not approve of exploitive, denigrating forms of sexual expression, neither do we wish to prohibit, by law or social sanction, sexual behavior between consenting adults.

To enhance freedom and dignity, the individual must experience a full range of civil liberties in all societies. This includes... a recognition of an individual's right to die with dignity, euthanasia and the right to suicide.54

If the objecting parents are correct in their claim that the public schools are promoting the tenets of a secular religion, it must be on the basis that the nonjudgmental treatment of moral issues without any affirmation of the supernatural is itself an implicit assertion that contradictory moral positions are equally tenable, that there is therefore no objective and binding moral order, and that the supernatural is not a necessary factor in the making of moral decisions. It is not unreasonable to describe such teaching as an implicit affirmation of a position that, in its relativism and secularism, is authentically religious. The Christian parents' concern is therefore understandable. As Paul Blanshard, a signer of Humanist Manifesto II, recently observed,

I think that the most important factor moving us toward a secular society has been the educational factor. Our schools may not teach Johnny to read properly, but the fact that Johnny is in school until he is sixteen tends to lead toward the elimination of religious superstition. The average American child now acquires a high-school education, and this militates against Adam and Eve and all other myths of alleged history... . . . When I was one of the editors of The Nation in the twenties, I wrote an editorial explaining that golf and intelligence were the two primary reasons that men did not attend Church. Perhaps I would now say golf and a high-school diploma.55

Ideas have consequences. And it is not unreasonable to conclude that a steady classroom diet of suspended judgment and laissez faire on moral issues can influence the students' own religious belief away from an acknowledgement of an objective law of God and can amount to an overall promotion of secularism. There is logic in the following comment by a writer in The American Atheist:

And how does a god die? Quite simply because all his religionists have been converted to another religion, and there is no

54. Id. at 51, col. 1.
one left to make children believe they need him.

Finally, it is irresistible—we must ask how we can kill the god of Christianity. We need only insure that our schools teach only secular knowledge; that they teach children to constantly examine and question all theories and truths put before them in any form; and that they teach that nothing is proven by the number of persons who believe a thing to be true. If we could achieve this, god would indeed be shortly due for a funeral service.\(^\text{54}\)

The point of this Article is not to attempt to prove the public schools are inculcating a religion of secularism, although the writer is strongly of the opinion they are doing just that. The point rather is to note the general theory and substantial character of the objecting parents' contentions. In light of the constitutional status of some forms of secularism as religions and in light of the intrinsic difficulty involved in attempting to treat sensitive moral issues in a nonjudgmental way, it can hardly be said that the parents' objections are arbitrary and irrational.

II. Remedies of the Objecting Parents

The major concern of objecting Christian parents is the recent and substantial involvement of public schools in matters of family life, sex education, and related areas. The objectors see this as further evidence that the schools are really indoctrinating pupils in a secular religion.\(^\text{57}\) There are two remedies worth discussing that are directed against the education courses themselves. One is the excusal of students from sex education and similar classes. The second is the elimination of such programs from the school curriculum. While both of these remedies are available through state and local legislatures, we are concerned here with whether and to what extent the courts will make them available on constitutional grounds.

Apart from those two remedies directed specifically against the controversial courses, three other approaches are worthy of consideration. The first is the introduction into the public schools of instruction in general, nonreligious principles of ethics and morality. The second is the formation of voluntary, extracurricular religious clubs in the public schools. The third is the formation


\(^{57}\) One such objection has been articulated as follows: "The statist educators have indeed controlled America's future by controlling its schools; they have made the curriculum of those schools more and more openly humanistic and anti-Christian." Rushdoony, \textit{Introduction to A. Grover}, supra note 34, at xiv (1977).
of independent private schools in which the education would be unencumbered by secularizing constitutional restraints.

A. Excusal of Pupils from Sex Education and Similar Programs in Public Schools

The requirements of the establishment and free exercise clauses "may overlap."58 On the one hand, as in the school prayer situation, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."59 On the other hand, the overlapping may occur through the granting, on religious grounds, of an exemption from a general obligation. This could possibly result in a violation of establishment clause neutrality through an implicit preference of the religious belief accorded the exemption.60 While a free exercise claim requires a showing that one is coerced in the exercise of his religion,61 the establishment clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."62 Therefore, although the primary concern with respect to excusal from sex education is the free exercise of religion, it is necessary that solicitude for the individual dissident stop short of the kind of favoritism toward his claim that would violate the establishment clause.

The few cases in which the class excusal issue has been presented indicate clearly that excusal will be allowed from sex education courses if the school authorities decide to permit it. But if those authorities decide to make the course compulsory, the courts will not interfere to require excusal. The decision to excuse or not, therefore, is legislative or administrative rather than judicial.63

If a program affords an opportunity for children to be excused from the classes, the courts will reject the claim that the program violates the free exercise of religion and will tend to regard as wholly insubstantial or immaterial the claim that such

a voluntary program violates the establishment clause. Moreover, the courts have not regarded favorably the claim that free exercise is implicitly violated by requiring the pupils to resist possible peer pressure in exempting themselves. There is no basis in the decided cases to expect that the peer pressure on pupils who might want to be excused from the course will be held to violate their free exercise of religion. If the courts did so hold, however, there would be no way to eliminate that peer pressure by judicial action and the only recourse would seem to be to abolish the course, with possibly chaotic consequences for the curriculum. In *Valent v. New Jersey State Board of Education*, the Commissioner of Education had argued against an excusal requirement because "[s]uch a precedent could open the door for demands for exclusion, on grounds of conscience, from such courses as health and physical education, biology, history and even English literature." In *Davis v. Page* the court sustained the compulsory use of audiovisual equipment over plaintiff's objection. In the absence of a reasonable alternative to the use of such equipment, the only way the state could lessen the burden on plaintiff's children would be "to provide separate courses of instruction for their children." The court noted that giving the parents the power to excuse their children would unduly disrupt the public school system. Moreover, the court ruled that

---


> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

*Id.* at 227 (concurring opinion). In a footnote to this passage, he further observed, "It deserves notice that in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that 'allowing him to take the religious education course might help him to become a member of the group.'" *Id.* at 227 n.18.
68. *Id.* at 68, 274 A.2d at 835 (emphasis in original) (quoting the Commissioner's memorandum to the state legislative committees on education).
70. *Id.* at 401.
71. The federal judge borrowed the words of the New Hampshire Supreme Court:

> [T]he power of each parent to decide the question what studies the scholars should pursue, or what exercises they should perform, would be a power of
"requiring the state to provide the children with a separate education conflicts with the Establishment Clause of the First Amendment."72

Several cases have sustained compulsory sex education courses where objecting students were not allowed to excuse themselves at all.73 And no appellate case has required excusal from such a course. Although there is no Supreme Court decision directly on point, it is not likely the Court would require excusal if it ever decided the issue. Several Supreme Court decisions are instructive here.

In West Virginia State Board of Education v. Barnette4 the absence of an excusal system made the mandatory flag salute in a public school a general violation of the first amendment. But Barnette involved "a compulsion of students to declare a belief."77

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.74

In Hamilton v. Regents of the University of California,77 the Court held that a student at a state university could be required to take military training courses. Attendance at the university was voluntary. The Barnette Court distinguished Hamilton on the ground that, unlike attendance at the University of California, attendance of the children at the public school "is not op-
A more tenable distinction, however, exists since *Hamilton* involved the state’s “power to raise militia and impose the duties therein upon its citizens.” In effect, the military power of the state was sufficiently strong to permit compulsory military training of those who chose to attend the state university, while in *Barnette* the desire to promote patriotism was insufficient to outweigh the general first amendment interests of the objectors.

The *Barnette* rationale does not require excusal of pupils from a sex education course, however, because pupils in such a course are not required to declare a belief. The sex education course does not violate the establishment clause because it is not, in the view of the courts, a religious exercise. If it were religious, it would be prohibited by the establishment clause whether or not excusal was allowed. But given the assumption or finding that the sex education course is religiously neutral, mere attendance at the course is clearly not a free exercise infringement of the magnitude of the compulsory pledge of allegiance ruled unconstitutional in *Barnette*. Significantly, the Court in *Barnette* did not require that the objecting pupil be excused from the classroom, but only that he not be required to participate in the salute and pledge.

In *Sherbert v. Verner* the Supreme Court held that a Seventh-day Adventist could not be denied unemployment compensation benefits because she refused, on religious grounds, to work on Saturdays. The regulation, said the Court, “forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” The Court found this to be an infringement of appellant’s free exercise of religion and held that it was not justified by a sufficiently compelling state interest. “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’” *Sherbert* could provide an argument that the mere requirement of sex education course attendance is an infringement of the free exercise of religion. But then

---

78. 319 U.S. at 632.
79. In his dissenting opinion in *Barnette*, Justice Frankfurter cogently observed that, while education was required by the state, attendance at the public school was indeed optional in light of *Pierce v. Society of Sisters*. Id. at 656 (Frankfurter, J., dissenting).
80. Id. at 632.
82. Id. at 404.
83. Id. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).
the issue would be whether a sufficient justification exists for the infringement. While the Sherbert Court found the prevention of spurious unemployment compensation claims by pseudo-Sabbatarians insufficient, the Court claimed its decision was reconcilable with Braunfeld v. Brown. There the indirect burden of a Sunday closing law on the religious practices of an Orthodox Jewish merchant was justified, according to the Sherbert Court, by "a strong state interest in providing one uniform day of rest for all workers." The interest asserted to justify compulsory attendance at a sex education course is the preservation of curricular integrity and the avoidance of the chaos that would result from recognition of conscientious exemption from particular courses. This interest in uniformity evidently will suffice to justify the infringement on the free exercise of religion of students who find the course objectionable.

It is clear, therefore, that school authorities will decide whether or not to permit objecting students to be excused from particular programs on account of conscientious objections. Free exercise claims here are appealing but they should be addressed to the legislature and administrative authorities rather than the courts. It is not difficult to imagine the confusion that would result from a judicial requirement of an excusal program. There are very few subjects in an elementary or secondary school curriculum that do not, at some time or another, involve an examination of moral and even religious ideas. English, social studies, and science are only a few of the subjects that would provide ready occasions for such objections. Resolution of the conflicting claims between educational stability and the rights of privacy and religion is better left to the state and local political process. Whether the relevant authorities choose to permit excusal from a course or to make the course compulsory, the courts will not interfere. There is no reason to expect that this situation would be changed by the Supreme Court of the United States were that body ever to decide the issue on its merits. Thus, an attempt to use the courts to compel excusal of objecting students is a waste of time. Even a successful court fight would bring only a limited victory because concentration upon excusal from a specific course does not address the more basic issues of whether public education is permeated throughout its curriculum with secularist premises.

85. 374 U.S. at 408. Cf. id. at 417 (Stewart, J., concurring in result) (arguing that the Sherbert holding conflicts with Braunfeld).
B. Elimination of Objectionable Programs from the Public School Curriculum

If the effort to use the courts to require excusal of pupils from particular courses is a forlorn enterprise, the more radical attempt to get the courts to remove those courses from the public school curriculum is utterly hopeless. One can argue cogently in principle that the involvement of the public schools in such matters as family life and sex education entails a violation of the religious neutrality required by the establishment clause and incidentally invades the privacy rights of parents and pupils. However, one must litigate issues in the light of decided cases. In that light, even though there is no direct Supreme Court holding on point, it is clear that such contentions will accomplish little in the courts today.

One avenue of attack used by objectors is the right of privacy. For example, in Cornwell v. State Board of Education a federal district court rejected the plaintiff parents' claim that "they have the exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools." The court summarily noted the lack of authority in support of such a constitutional right, which the court thought a "novel proposition." In support of the sex education program, the Cornwell court relied upon "the State's interest in the health of its children."

A similar privacy argument was unavailing in Medeiros v. Kiyosaki. There the court quoted Griswold v. Connecticut to distinguish Meyer v. Nebraska and Pierce v. Society of Sisters on the ground they stand for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." The court also ruled that the sex education program in Medeiros, unlike the prohibition of the use of contraceptives in Griswold, was not overly broad, particularly since parents could preview the lessons on

87. Id. at 342.
88. Id.
89. Id. at 344.
91. 381 U.S. 479 (1965).
92. 262 U.S. 510 (1925).
93. 268 U.S. at 441, 478 P.2d at 317 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).
educational television and then request that their children be excused. The privacy claim was also rejected in *Hopkins v. Hamden Board of Education*, where the court, in sustaining a compulsory sex education and family life course, noted that the only evidence offered by the plaintiffs on the privacy issue reflected their fear of disclosures by a child in the curriculum classroom discussions of private family activities or conversations which have taken place in the home. Disclosures of this nature are not constitutionally protected and do not constitute an unlawful invasion of privacy under the fourth amendment . . . nor under any other law known to the court.96

In *Davis v. Page*97 the parents' privacy claims were accurately summarized by the court.

The interests asserted by the parents are clear. They have a legal, moral, and religious responsibility to protect and maintain the health, welfare, and safety of their children. . . . The parents also want their children to follow their religious beliefs. Parents teach and instill in their children, from the earliest age, the religion that they believe will sustain and nurture them during life's struggles.

The School Board's policy directly burdens this right, for it allows to be done in the school what is prohibited at home. It places the children between the Scylla of obeying their parents' religious teachings and the Charybdis of obeying the commands of their teachers and school authorities. The tension produced by this conflict cannot help but reduce the parents' effectiveness in directing the religious upbringing of their children and the School Board's effectiveness in providing the children with a proper education.98 Nevertheless, the court found "in weighing the rights and interests of the parties, with regard to audio-visual equipment, that the balance tips in favor of the state."99 Significantly, the conflict in *Davis v. Page* was direct and coercive: the children were required to remain in the classroom during audiovisual presentations forbidden by their religious beliefs.100

The establishment clause has been no more successful than

---

96. Id. at 416, 289 A.2d at 924.
98. Id. at 399-400.
99. Id. at 400. In Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 28-33, 124 Cal. Rptr. 68, 89-92 (1975), the parental privacy claim was rejected on the various grounds stated in *Cornwell, Medeiros, and Hopkins*.
100. 385 F. Supp. at 397.
the right of privacy as a basis for attacking the validity of sex education and similar programs in public schools. On this issue, the Supreme Court decision in *Epperson v. Arkansas*\(^{101}\) may be controlling. There the Court said:

The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.\(^{102}\)

To remove sex education courses from the curriculum because they conflict with the religious views of some parents would not only be an invitation to curricular pandemonium; it would violate the principles enunciated in *Epperson* as well.

The decisive factor here, from the standpoint of the establishment clause, is the courts' treatment of secular public education, including sex education, as authentically neutral and not itself religious.\(^{103}\) In *Cornwell v. State Board of Education*\(^{104}\) the court upheld a family life and sex education program "quite simply as a public health measure."\(^{105}\) As the Supreme Court has indicated, "the State's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control."\(^{106}\) The description of the family life and sex education program as merely a "public health measure" is crucial. The court found lacking in *Cornwell* the sort of "overt religious activities"\(^{107}\) that were present in the school prayer cases. Apparently for this reason, the court measured the program by a

---

102. Id. at 103, 106.
103. In 1947, Justice Jackson articulated this concept:

   Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.

105. Id. at 344.
106. Id. (quoting *Prince v. Massachusetts,* 321 U.S. 158 (1944)).
107. Id. at 343.
rational basis test rather than by a compelling state interest standard. As the court said in Hopkins,

Unless the plaintiffs claim that a secular program was a form of religion, there appears to be no proof, from evaluating the evidence in a light most favorably [sic] to the plaintiffs, that the teaching of the curriculum will in fact establish any religious concept or philosophy in the school system.

The decisive point is that the courts will not assume that a secular program is made inherently religious by its secularity. But this is precisely the point raised by the constitutional recognition of nontheistic creeds as religions. Paradoxically, secularism is recognized as a religion while a secularistic treatment of basic issues of sex and family is considered a religious and merely a "public health" measure. It remains clear, however, that the courts today will turn a deaf ear to pleas that sex education and similar programs are inherently religious in nature and therefore violative of the neutrality mandate of the establishment clause. Indeed, it is far more likely the courts will say that to enjoin a program "because it incidentally offended the religious beliefs of certain parents and students" would itself violate the establishment clause. Prevailing court decisions offer no remedy to parents who desire to compel excusal of their children from courses to which they object and offer absolutely no hope of compelling the elimination of such courses from the curriculum. The key to these conclusions is the refusal by the courts to agree that nonjudgmental, secular courses in sex education and similar matters are themselves religious, despite the judicial recognition that such secular creeds as Secular Humanism are religions in the constitutional sense. However, even if the Supreme Court were to reverse the mandate of neutrality between theism and nontheism,

108. Id. at 342.
110. The Supreme Court has said "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
112. Id. at 18, 124 Cal. Rptr. at 82.
113. Parents conceivably could raise a statutory challenge to the programs as lacking sufficient authorization from the legislature, a theory that is not precluded by the constitutional doctrines discussed. A claim of this sort should be one of the first remedies considered by counsel for objecting parents. Nevertheless, no such claim has succeeded at the appellate level. See Medeiros v. Kiyosaki, 52 Haw. 436, 444-47, 478 P.2d 314, 319-20 (1970); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 401-06, 289 A.2d 914, 917-19 (C.P. 1971); 68 AM. JUR. 2d Schools § 284 (1973).
and even if it were to relax the strict application of the Bill of Rights to state and local governments, the result would be of little help to the objecting Christian parents since courses such as sex education would then be overlaid with a veneer of common denominator theism which would satisfy no one and would activate the considerable energies of secularists in opposition to them. A similar futility would attend the restoration of "school prayer" by a constitutional amendment or a judicial decision reversing Engel v. Vitale and Abington School District v. Schempp. The philosophic confrontation over the public schools today is much too basic to be resolved by an attempted baptism of sex education courses or by a cosmetic restoration of a ritual prayer neither of which would address the curricular issues.

C. Positive Remedies Within the Public School

While there is little doubt that objecting Christian parents have no judicial remedies of a negative or exclusionary nature against what they regard as improper secularization of the public schools, it does not follow that such parents have no remedies at all within the public school. Two available remedies are worthy of consideration here. One is the introduction into the curriculum of generalized, nonsectarian instruction in morality. The other is the recognition of extracurricular, voluntary student clubs for the study and even propagation of religion.

The starting point with respect to both of these alternatives is the neutrality mandate of the establishment clause. This scrutiny involves the application of a three-pronged test. A program is constitutionally neutral only if (1) it has a secular purpose, (2) it has "a 'primary effect' that neither advances nor inhibits religions," and (3) its administration avoids "excessive government entanglement with religion." It is important to note here that

[t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

And, as Justice Goldberg observed in *Schempp*, "great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." Much of the definitive litigation in this area has involved statutes providing financial aid directly or indirectly to church-related schools. Of course, those subsidy cases are distinguishable from the issue of teaching morality or recognizing a student religious club at a public school. Nevertheless, the general establishment clause principles are controlling in the elementary and secondary school situations as well.

1. **Teaching morality in the public schools**

   In the *Schempp* case, the Supreme Court recognized that “the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.” Thus the Supreme Court has not wholly excluded religion from the public schools. As part of social studies or some other secular subject, the public school is permitted to teach its pupils about various religions so long as it is done non-judgmentally. Indoctrination, or affirmation of any particular religious belief as true, would of course not be permitted. These restrictions, however, do not as clearly apply to teaching about morality, although there is an inherent difficulty in distinguishing morality from religion.

---

118. 374 U.S. at 308 (Goldberg, J., concurring).
120. 374 U.S. at 225.
121. In the context of conscientious objection to military service, the Supreme Court has held that “religious training and belief” for purposes of the Universal Military Training and Service Act, 50 U.S.C. App. §456(j) (1970), encompasses all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.
When a public school course treats controversial issues (abortion or capital punishment for example), the teachers may properly describe in a nonjudgmental way the various religious positions on the subjects. But with respect to morality, the public school can apparently do a certain amount of indoctrination, at least with respect to civic virtues. Thus, Justice Brennan observed in *Schempp* that there is a duty on the public schools to provide "an atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic." To some limited extent, it seems a public school teacher could carry out a mandate such as that contained in the California Education Code:

> Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, including kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government.

These and other civic virtues may well be merely the articles of faith of what Will Herberg described as "America's civil religion." Nevertheless, it appears that to a considerable extent the courts will permit the public schools to inculcate such precepts of civic virtue, provided they do not carry it beyond the point where religious neutrality is infringed. This sort of civic training should not be unduly disparaged. There are some who see it as a major focus of public education in the wake of the Court decisions banning prayers and other overt religious exercises from public schools. A public school program of civic character formation would be likely to pay dividends in the reduction of vandalism and in other ways. And many concerned theistic parents would be satisfied with the performance of that

---

122. 374 U.S. at 242 (Brennan, J., concurring).
123. CAL. EDUC. CODE § 44806 (West 1977).
function by the public schools. However, the limited inquiry of this Article is whether the confrontation between public educators and the militantly Christian parents who oppose them can be compromised by such generalized character education. In realistic terms, such a compromise cannot be achieved. While honesty, respect for the rights of others, and similar verities are common to "character building" and to the militantly Christian position, there is an irreconcilable chasm on the ultimate questions. For example, the minimum standards for Ohio elementary schools which were involved in State v. Whisner\textsuperscript{126} included such moralisms as "'Democracy is based on such beliefs as the integrity of man, the dignity of the individual, equality of opportunity, man's rationality, man's morality, man's ability to govern himself and to solve his problems co-operatively.'"\textsuperscript{127} Yet the objecting parents rejected this sort of moralizing because it is "man-centered" and "places all its emphasis on the present life, with no provision for the teaching of an after-life."\textsuperscript{128} For those parents and others who object to public education as permeated with secular humanism, small consolidation will be offered by the schools' effort to teach morality in a manner that avoids such questions as whether God or some other is the source of rights and duties and whether there is an afterlife. So, to whatever extent the courts allow the public schools to inculcate civic virtue, that remedy will be inadequate to resolve the confrontation that is the subject of this Article.

2. Recognition of extracurricular religious clubs in public school

It is well settled that minors are entitled to constitutional rights, including those protected by the first amendment and the right of privacy.\textsuperscript{129} Moreover, the Supreme Court has recognized that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\textsuperscript{130} In upholding the right of students to wear black armbands in protest against the Vietnam War, so long as the exercise of their right of expression did not "materially and substantially disrupt the work and discipline of the school"\textsuperscript{131} the Supreme Court noted that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communi-

\textsuperscript{126} 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).
\textsuperscript{127} A. Grover, supra note 34, at 73 (emphasis deleted) (quoting Minimum Standards for Ohio Elementary Schools § EDb-401-03(B), at 49 (rev. ed. 1970)).
\textsuperscript{128} A. Grover, supra note 34, at 76.
\textsuperscript{131} Id. at 509.
cate.’’

In *Johnson v. Huntington Beach Union High School District*, public high school students sought recognition from the school of an extracurricular "club whose express purpose was to 'enable those participating to know God better . . . by prayerfully studying the Bible' and whose membership would be open only to those who 'have a genuine interest in the fulfilling of the purpose of this organization.'" School authorities denied recognition to the club, although nonreligious clubs were recognized and were permitted to use classrooms and other space for club meetings and to publicize their activities through the school newspaper and bulletin boards. The court upheld the school. Recognition, said the court, would not only give financial support to the club, e.g., heat, light, and a faculty sponsor, but also would "place school support and sponsorship behind the religious objectives of the club" and "foster excessive state entanglement with religion." Furthermore, the court felt the potential recognition of competing religious clubs "could engender student divisiveness in matters of religious beliefs."

Thus, the *Huntington Beach* decision remains a potential obstacle to the availability of organized clubs as a religious influence in the schools. The rationale of that holding, however, fails to adequately address significant first amendment claims having strong basis in existing Supreme Court precedent. It is to be hoped that courts confronted with future religious club recognition cases will not blindly follow the recent California decision and will recognize the important protected interests of the public school students outlined in the discussion that follows.

In only four cases has the Supreme Court specifically ruled on the merits of religious activities in the public school system. In *McCollum v. Board of Education*, the Court ruled that released-time religion classes, conducted during a regular class period in public school classrooms by sectarian teachers, were

---

132. *Id.* at 511.
133. *Id.* at 513.
135. *Id.* at 8, 137 Cal. Rptr. at 46.
136. *Id.* at 13-14, 137 Cal. Rptr. at 50.
137. *Id.* at 14, 137 Cal. Rptr. at 51. For a discussion of controversies over religious clubs in other jurisdictions, although there are no reported cases at this writing, see *Advocate*, Spring 1978, at 1, 3 (published by the Christian Legal Society, Oak Park, Ill.).
unconstitutional. Students whose parents did not request they attend the religion classes spent that time on secular studies in another classroom. Four years later, however, in *Zorach v. Clauson,* the Court upheld a program in which the public schools released for a school period those students whose parents so requested, so that the students could go to churches or church schools for religious classes.

The *McCollum* and *Zorach* programs are distinguishable on two grounds. Of lesser importance, the instruction invalidated in *McCollum* was held on the public school premises while the instruction upheld in *Zorach* was given in private facilities. But it is doubtful this mechanical distinction is sufficient to account for the difference in result. Rather, the second and more basic distinction is that in *McCollum* there was a degree of sponsorship by the public authorities and of implicit coercion that was lacking in *Zorach*.

In *Zorach,* the Court emphasized the desirability of accommodation between government and religion. Justice Douglas, speaking for the Court, warned that if "separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people," it would reflect "a philosophy of hostility to religion." Although the court in *Huntington Beach* concluded that the recognition of the religious club "goes far beyond the accommodation endorsed in *Zorach,*" there is lacking in the club situation the sort of official sanction that was involved in *McCollum.*

The other two cases in which the Supreme Court has ruled definitively on religious exercises in the public school system are *Engel v. Vitale,* involving the voluntary recitation by students of a state-composed prayer, and *Abington School District v. Schempp,* striking down a similar practice of Bible reading and recitation of the Lord's Prayer. In *Engel,* the Court declared that

---

139. 343 U.S. 306 (1952).
142. 343 U.S. at 315.
143. 68 Cal. App. 3d at 14, 137 Cal. Rptr. at 51.
144. Justice Brennan later commented that the "deeper difference" between *McCollum* and *Zorach* "was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not." *Abington School Dist. v. Schempp,* 374 U.S. 203, 262 (1963) (Brennan, J., concurring).
"each separate government in this country should stay out of the business of writing or sanctioning official prayers . . . ." 117 In both Engel and Schempp, the religious activity was carried out during regular classroom time and was part of the curriculum. Thus, those cases should not control the religious club issue.

Likewise, the club issue does not turn on the dictum by the Schempp Court approving the objective study of the Bible. 118 Apart from the question of whether a nonjudgmental study of the Bible is truly objective, it is plain that study of the Bible and religion "as part of a secular program of education" 119 will not justify recognition by school authorities of religious clubs. These clubs, at least implicitly, involve a measure of devotion and even proselytization, just as would a Young Democratic Club.

As noted above, 150 to pass the establishment clause test the recognition of a religious club must have a secular purpose; its primary effect must neither advance nor inhibit religion; and it must not foster excessive government entanglement with religion. The recognition of such a club would have a secular purpose in the facilitation of the students' general rights of speech and association. The primary effect and entanglement tests, however, involve a judgment of degree, particularly in light of the Court's statement that the main object of the establishment clause as a whole is to avoid "sponsorship, financial support and active involvement of the sovereign in religious activity." 151 In a sense, recognition of the religious club would entail a type of school sponsorship of religious activity. For example, in State Board of Education v. Board of Education 152 the New Jersey courts forbade a public school's practice of allowing pupils to meet voluntarily in the auditorium before school hours to read aloud from the Congressional Record the congressional chaplains' prayers opening the sessions of the House and Senate. The meeting was, in the eyes of the court, a prayer session. 153 On the other hand, in Reed v. Van Hoven 154 a federal district court permitted a voluntary

---

147. 370 U.S. at 435.
148. 374 U.S. at 225; see text accompanying note 120 supra.
149. 374 U.S. at 225.
150. See note 116 and accompanying text supra.
153. See also Stein v. Oshinsky, 348 F.2d 999 (2d Cir.) (school district could not be required to permit elementary school pupils voluntarily to say a theistic grace), cert. denied, 382 U.S. 957 (1965). Accord, De Spain v. De Kalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).
prayer session before or after the school day. The court considered its action to be "a permissible form of accommodation" and warned that "the public schools, as between theistic and humanistic religions, must carefully avoid any program of indoctrination in ultimate values."\(^{155}\)

It would be appropriate and consistent with Supreme Court rulings in the establishment area to regard some theoretical violations as de minimis. The mere recognition of a religious club could well fall into that category. In any event, an emphatic disclaimer by the school of any endorsement or support for the views of the participants in such a club, as for a Democratic or Republican club, should serve to negate any inference of sponsorship that might otherwise theoretically arise from allowing the club to meet during freetime in unused rooms.\(^{156}\) A similar de minimis approach could be taken to the assertion that recognition of such a club would involve an improper expenditure of public funds in support of religion. If we are talking about mere use of an empty classroom or other rooms, there is no basis in any actual ruling (as opposed to judicial rhetoric) of the Supreme Court to find such a trivial expenditure as lighting a room which would otherwise be unlighted to be an establishment clause violation. If a religious club were allowed the use of duplicating equipment, clerical help, or other school facilities made available to all private clubs, a significant degree of financial support might emerge. But this must be balanced against the protection of such competing rights as speech, association, and the free exercise of religion. As the Supreme Court stated in *Meek v. Pittenger*,\(^{157}\)

The Court has broadly stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, 330 U.S. 1, 16. But it is clear that not all legislative programs that provide indirect or incidental benefit to a

---


156. See *Stacy v. Williams*, 306 F. Supp. 963, 980 (N.D. Miss. 1969). A New York county court upheld a public school board's granting of permission to a group of citizens to erect a Nativity creche "upon a small portion of spacious school grounds . . . during a period of the Christmas Holidays, when school was not in session and without any involvement of the school personnel or school district's expense." The court regarded the permission as "merely a passive accommodation of religion." *Lawrence v. Buchmueller*, 40 Misc. 2d 300, 302-03, 243 N.Y.S.2d 87, 90-91 (Sup. Ct. 1963).

Essentially, the establishment clause is ancillary to the free exercise clause, that is, "the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion." As the Supreme Court noted in *Sherbert v. Verner,* when a free exercise claim is involved "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Although the case did not involve a regulation of religious conduct, but rather a claim of exemption from a general prerequisite for a public subsidy, the preferred position of the free exercise clause indicated in *Sherbert* is relevant to the issue of the Bible club. It is difficult to envision any state interest sufficiently compelling to require that the petitioning students be denied, on account of their religion, the benefit of club recognition made available to others. If the school were to recognize no clubs, which would be within its prerogative, the religiously oriented students would have no sufficient claim to an exemption from that general prohibition. But if some clubs are allowed and theirs is prohibited solely on account of its religious character, the result would seem in conflict with the basic free exercise principle enunciated in *Everson v. Board of Education* that the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." The abstract principles of establishment clause cases ought not to outweigh this basic rule of fairness. Nor is it tenable to say that denial of recognition is necessary to avoid "student divisiveness in matters of religious

---

158. *Id.* at 359 (other citations omitted). See also *Smith v. Smith,* 523 F.2d 121 (4th Cir. 1975), *cert. denied,* 429 U.S. 806 (1976) (upholding a released time program in reliance on *Zorach* and *Meek*).
161. *Id.* at 406 (quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945)).
162. *See Pfeffer,* *The Supremacy of Free Exercise,* 61 Geo. L.J. 1115, 1139-42 (1973), where the author comments that "subject to change without notice, free exercise has become the favored child of the First Amendment." *Id.* at 1142.
164. *Id.* at 16 (emphasis in original).
An artificially imposed tranquility, achieved at the cost of muzzling the sincerely and peaceably held opinions of some, can hardly be the objective of the first amendment. Indeed, the muzzling of religious opinions, while other views are given free play, would seem likely to increase rather than reduce religious divisiveness.

Denial of recognition to a religious club would also seem to conflict with the students’ rights of free speech and association. In Garvin v. Rosenau the court held that where a public high school permitted an ecology club and other groups, the district court should not have dismissed the complaint of students who sought to form a student mobilization committee as a club to express their views on the Vietnam War. The school policy forbade clubs, such as the Young Republicans and Young Democrats, that supported “one point of view.” Similarly, in Wood v. Davison, the court found an infringement of students’ first amendment rights in the denial of school facilities to a student Committee on Gay Education, a group promoting homosexual rights. In Healy v. James the Supreme Court held that a state college could not deny recognition to a student chapter of Students for a Democratic Society in the absence of a showing that the group refused to comply with reasonable campus regulations so as to pose “a substantial threat of material disruption.” The Court in Healy rejected the view that “First Amendment protections should apply with less force on college campuses than in the community at large.”

The denial of recognition to a Bible club would clearly be based on the content of the communications the members sought to make among themselves. Unless the content of such communications tends to disrupt the school, it ought not to be prohibited because it is religious when other types of organizations are recog-

---

166. 455 F.2d 233 (6th Cir. 1972).
167. Id. at 235.
171. Id. at 189.
172. Id. at 180; see also Hudson v. Harris, 478 F.2d 244 (10th Cir. 1973). In Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974), the court said “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.” Id. at 660 (emphasis added) (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).
nized. The Supreme Court has said that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Even if disorder is a possibility, the preferred remedy in the religious club situation should be "subsequent punishment" rather than prior restraint.

Recognition of a religious club could also draw support from the first amendment right of reasonable access to a public forum for the propagation of one's views. The theory is that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Although a public building may be used for the expression of ideas and even for peaceful protest, a specialized place such as a school or a jailhouse may be legitimately restricted to "the use to which it is lawfully dedicated." But where the school authorities have recognized other clubs, thus providing a forum within the school for clubs generally, they should have no right to deny the use of that forum to some members of the school community solely because their views are religious.

Also involved in the religious club matter is the right to hear, that is, the right to receive information. The rights of prospective as well as present club members and of the passive bulk of the student body could be analyzed under this heading.

173. It is well established that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
178. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972); see also Grayned v. City of Rockford, 408 U.S. 104 (1972).
is a positive value in maintaining the channels of communication among students. Whether the religious club issue is considered from the point of view of the prospective speakers or hearers, the dispositive fact issue will be the same: whether there exists a sufficiently compelling governmental interest to justify the abridgement of a first amendment right.

The encouragement of extracurricular religious clubs would seem to be within the rights of the objecting Christian parents with whom this Article is concerned, the Huntington Beach decision notwithstanding. Such clubs would appear to offer significant opportunities for study and, to a limited extent, proselytization. However, in light of the cosmic concerns expressed by some parents, the formation of religious clubs in the public schools would be only a fragmentary remedy for the problems they profess to see. The ultimate remedy for those parents is the establishment of their own schools.

D. The Independent Christian School

"The essence of education is that it be religious," wrote Alfred North Whitehead. The current Supreme Court definition of religion, embracing not only theism but all shadings of atheism and agnosticism as well, makes the accuracy of Whitehead's remark apparent. Until recently, the legitimacy of religious influence in education, whether public or private, was acknowledged throughout our history. Even today, there is an air of unrealism in the pretense that the secular public school is authentically a religious. Justice Jackson, in his Everson dissent, properly observed that the public school "is organized on the premise that secular education can be isolated from all religious

183. In Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court said, in striking down a prohibition against the advertisement of prescription prices,

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id. at 770.

184. Incidentally, the right to form a religious club also would seem to include the right of the members to invite outside speakers onto the campus, at least where other student clubs are allowed to invite outside speakers to address them. Similarly, a public school teacher would seem to be protected by the concept of academic freedom if he chooses to invite religious speakers, among others, to address his classes where such is relevant to the subject matter of his course. Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976).

teaching. . . . The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion."186 But that stance of the public school can hardly be described as anything but itself a religious position. It affirms the separability of religion from secular life, which is nothing less than an affirmation of at least the partial irrelevancy of God's law to the world He created. An adequate examination of this question, of course, would require much more than a law review article. What we can safely say, however, is that the differences of the militant Christian parents with the public school are so fundamental that no cosmetic remedy will resolve the conflict. The parents' position ultimately tends to be that public elementary and secondary education itself is a violation of the religious neutrality required by the establishment clause. It is not necessary, however, to prove that contention in order to justify an adequate remedy for the objecting parents. Their position is essentially defensive. They seek not to dismantle the public schools but to educate their own children according to God's law as they see it. The palliative remedies discussed above would not suffice even if they were available through the courts. Rather, the parents' contention, and the point of this Article, is that they ought to be allowed to go their own way.

The constitutionality of compulsory attendance laws is well established; the state may properly require parents to place their children in a school or otherwise to provide them with equivalent instruction.187 The state may not, however, require that all children attend public schools.188 Nevertheless, the constitutional right to educate one's children in private schools does not confer on those schools a constitutional immunity from reasonable state regulation to determine the adequacy of the education provided in them. Likewise, when a parent undertakes to educate his child

---

186. 330 U.S. at 23-24 (Jackson, J., dissenting).

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court struck down a statute prohibiting instruction in any school, public or nonpublic, in any language other than the English language. See also Farrington v. Tokushige, 273 U.S. 284 (1927).
at home rather than in a school of any sort, he is subject to the power of the state to ensure that the education provided at home is equivalent to that provided in a public or private school.\textsuperscript{189} Moreover, the Supreme Court has refused to raise private tutoring to the same constitutional level as education in a private "school."\textsuperscript{190} Thus, under the prevailing interpretations, the state may, pursuant to its police power, constitutionally require that all children attend some school, whether public or private. Therefore, when the states do permit equivalent instruction at home, they do so as an exercise of legislative grace and not as a matter of constitutional duty.\textsuperscript{191}

While the claim by parents of the right to educate their children at home is peripheral to the Christian school controversy with which this Article is concerned, some principles developed in the home teaching cases have a significant impact on formally organized private schools. Where permitted, such home instruction must comply with reasonable state standards of equivalency.\textsuperscript{182} Among other measures to ensure the equivalency of home instruction, the state may properly require, under the decided cases, that the parent or other instructor be a teacher certified by the state.\textsuperscript{193} On the other hand, equivalency of the physical

\textsuperscript{189} See T.A.F. v. Duval County, 273 So. 2d 15 (Fla. 1973); Rice v. Commonwealth, 118 Va. 224, 49 S.E.2d 342 (1948); Annot., 65 A.L.R.3d 1222 (1975); Annot., 3 A.L.R.2d 1401 (1949).

In Board of Educ. v. Allen, 392 U.S. 236 (1968), the Supreme Court said, since Pierce, a substantial body of case law has confirmed the powers of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of Pierce v. Society of Sisters: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

\textit{Id.} at 245-47 (footnotes omitted).

\textsuperscript{190} Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).


\textsuperscript{192} See State v. Massa, 95 N.J. Super. 382, 382, 231 A.2d 252 (Morris County Ct. L. Div. 1967) (permitting education at home on a showing of equivalency of academic content). But in Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. Ct. 1937), the court was of the opinion that in view of the role of education in developing citizenship, "it is almost impossible for a child to be adequately taught in his home. I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any manner or form comparable to that provided in the public school."

\textit{Id.} at 92, 189 A. at 137.

facilities to those of the public schools seems not to be required. In *Wisconsin v. Yoder*, in which the Court ruled that the state had no sufficient compelling interest to justify application of a compulsory attendance law to Amish parents who refused to send their children to high school, the Court recognized "the State's interest in universal compulsory education," but said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Application of this standard was involved in *State v. Whisner*. In *Whisner*, parents of students attending the Tabernacle Christian School, together with the school's principal, Reverend Levi Whisner, resisted the application to that school of the minimum standards established by the Ohio State Board of Education. At the Tabernacle Christian School, the only teacher was certified in Ohio as well as three other states. The course of study required by the school included mathematics, spelling, English, social studies, history, civics, science, reading, art, music, and physical education. The students at the school registered superior marks on the Stanford Achievement Test. The school was in session six hours per day for 180 days per year. The daily attendance was reported to public officials and the school admitted public officials for the purpose of making health, safety, and fire inspections. The governing statute, however, required that every child "attend a school which conforms to the minimum standards prescribed by the state board of education." The parents and Reverend Whisner were convicted of violating this statute. On appeal, however, the convictions were unanimously reversed by the Ohio Supreme Court.

The Ohio minimum standards were held to violate the defendants' free exercise of religion in several respects. The minimum standards provided, "a charter shall be granted after an inspection which determines that all standards have been met." The court said that "such absolute compliance" was not required by the governing statutes. One standard allocated instructional time for state-prescribed subjects "which, by their very nature,

196. Id. at 215.
197. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).
199. 47 Ohio St. 2d at 201, 351 N.E.2d at 762 (emphasis added).
200. Id. at 205, 351 N.E.2d at 764.
may not easily lend themselves to the teaching of religious principles (e.g., mathematics)." The court ruled this was a violation of the free exercise of religion because it failed to leave sufficient uncommitted time in the school day for a private school to use for religious training or such other instruction or activity as it might deem appropriate.\footnote{Id. at 207, 351 N.E.2d at 765.}

Another minimum standard held to violate the defendants' free exercise of religion was the mandate that "all activities" of a nonpublic school "conform to policies adopted by the [state] board of education."\footnote{See id.} "All activities" of a religious school, of necessity, must include religious activities. The court considered it unconstitutional, under the establishment clause, to require such religious activities "to conform to the policies of a purportedly 'neutral' board."\footnote{Id. at 201, 351 N.E.2d at 762.}

Finally, the court held unconstitutional the following standard: "Efforts toward providing quality education by the school for the community it serves shall be achieved through cooperation and interaction between the school and the community. The understanding of the roles of each and a flow of information are basic to this relationship."\footnote{Id. at 207, 351 N.E.2d at 766.} Since the religion of the defendants required them "to engage in complete, or nearly complete, separation from community affairs,"\footnote{Id. at 201, 351 N.E.2d at 762.} and since the court interpreted this standard to require interaction between the school and the general community rather than between the school and the limited religious community it serves, the court concluded that this requirement of interaction was an infringement of the defendants' free exercise of religion.\footnote{Id. at 209-10, 351 N.E.2d at 767.}

Significantly, the prosecutor in the trial of the Whisner case objected to the introduction of the Stanford Achievement Test scores of the Tabernacle Christian students as "irrelevant and immaterial."\footnote{A. Grover, supra note 34, at 5, 6 (1977) (quoting Transcript of Testimony at 282, State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1970)).} Apparently, the state took the position that compliance with the minimum standards was indispensable to an adequate education.

The Whisner case is not conclusive on the right of independent Christian schools to exist. The Ohio minimum standards
were self-contradictory in major respects and were extreme in their effort to achieve equivalency of public and private education. The refusal of the parents and Reverend Whisner to comply with any state regulation except health, safety, and fire rules and those requiring attendance reports is a common tactic among supporters of Christian schools. When the decisive case comes, it will involve the refusal of an efficient and well-established school to submit to moderate and conciliatory state regulations. The case law, or at least dicta, would seem to support the imposition of such standards by the states. The issue, however, cannot be said to be closed.

If the state's interest is in promoting literacy and civic competence among the citizenry, it is not clear that education in public schools is an indispensable means to the accomplishment of that end. And it is difficult to see how private, church-related schools can properly be regarded as so inadequate that they cannot do the job without state supervision over the content and method of their instruction and the certification of their teachers. It is not merely an exercise of post hoc, ergo propter hoc to note that the dominance of public education has not exactly brought about an increase in either the literacy or the civic competence of its beneficiaries. "Average scores on the Scholastic Aptitude Test have been declining for more than a decade, and the National Assessment of Educational Progress, financed by the Federal Government, estimates that 13 percent of the nation's 17-year-old high school students are functionally illiterate." It is worth considering that The Federalist Papers were published in the popular press and were written for the average, church-school educated citizen in New York. One may speculate as to how many high school seniors could read them intelligently today.

It would be useful to consider here the principle that "reasonable and adequate alternatives" should be used in preference to greater restrictions on constitutional rights. Thus, the Court in Yoder said "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." It would seem reasonable for a

213. 406 U.S. at 215 (emphasis added).
state to require, in addition to reasonable fire, safety, and health regulations, merely that a school be such that its students are required to be in attendance for the same number of days as are required for public school students. This would eliminate any state control over content or method of teaching and qualifications of teachers. It would depend, however, on the presumption that any student in regular attendance at any organized school will be as well educated as he would be in a public school. In view of the recent track record of public education, this presumption could become very strong indeed.