

# STATE REGULATION OF CHRISTIAN SCHOOLS

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*How can nonpublic education be both responsible and free? Responsible to serve the public interest; free to experiment and disagree. Without regulation, some schools may victimize patrons and endanger the general welfare. With regulation, dissent is jeopardized. Where should the balance be struck?*<sup>1</sup>

Christian day schools<sup>2</sup> are the fastest growing segment of private education.<sup>3</sup> This growth has been accompanied by an unprecedented amount of litigation between fundamentalist educators and the state, and an unprecedented amount of negotiation and legislative proposals.<sup>4</sup> The fundamentalists contend, as a matter of religious conviction, that the state's role in the regulation of fundamentalist schools is limited to ensuring that every school provides its students with a basic core curriculum and that the schools satisfy reasonable fire, health, and safety standards.<sup>5</sup> Government officials, perceiving their role as encompassing much more, have often enacted a variety of laws and regulations which govern, among other things, teacher qualifications, curriculum, and textbooks.<sup>6</sup> Government officials allege that the existing structure of laws and regulations is a necessary and unobtrusive means to ensuring that every child in the state receives an adequate education.<sup>7</sup>

The conflict between the fundamentalists and the state has been

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1. PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 2 (D. Erikson ed. 1969).
2. When used throughout this Article, the terms Christian day schools, Christian schools, and fundamentalist schools are used synonymously.
3. See THE PHILOSOPHY OF CHRISTIAN SCHOOL EDUCATION 1 (P. Kienel ed. 1977) [hereinafter cited as KIENEL]. Based on the best available data, between eight and ten thousand of these schools have been established since the mid-1960's, with a current enrollment of approximately one million students. Carper, *The Christian Day School Movement, 1960-1982*, 17 EDUC. F. 135 (1983).
4. This article shall be limited to legal controversies between the fundamentalist educators and the state. The entire controversy, however, is much broader. See Devins, *Fundamentalist Schools vs. the Regulators*, Wall St. J. Apr. 14, 1983, at 26, col. 3.
5. See Ball, *Religious Liberty: New Issues and Past Decisions* in A BLUEPRINT FOR JUDICIAL REFORM, 327-49 (P. McGuigan & R. Rader eds. 1981).
6. See *id.*
7. See Brown, *Minimum Standards are Needed*, CHURCH & STATE, May, 1980, at 8. Underlying this belief is the presumption that a substantial enough number of private sectarian schools will fail in their education mission to justify state-imposed burdens on pluralism,

heightened by the varying successes and failures of each group before state boards of education,<sup>8</sup> in the halls of the state legislature,<sup>9</sup> and before the courts.<sup>10</sup> Since Christian educators and state officials can point to "victories for their side" in other states, both groups have strengthened their resolve to remain fixed in their position. Yet varying policy determinations on the part of state rulemakers and state lawmakers do not suggest that neither side is right or wrong or that no sensible policy alternative exists. Inconsistent judicial holdings certainly do not suggest that there is not an appropriate standard of review in this type of litigation.

Freedom of choice lies at the heart of American democracy.<sup>11</sup> Yet some individuals contend that in the field of education, government regulations should promote a state-selected system of values. A democracy should encourage all of its citizens to develop and refine their personal interests so that they can effectively participate in the political process. A pluralistic society, like ours, certainly should not attempt to breed conformity through its educational system.<sup>12</sup>

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religious liberty, and parental rights. The evidence, however, is to the contrary. See *infra* note 17.

8. In Colorado, for example, fundamentalists were successful in their lobbying efforts to prevent the State Board of Education from adopting minimum standards for private schools. See Craby, *Educators Expect Fight Over Minimum Private-School Standards*, Denver Post, Aug. 11, 1981, and Carper, *The Whisner Decision: A Case Study in State Regulation of Christian Day Schools*, 24 J. CHURCH & STATE 281, 301 n.67. In Maine, however, fundamentalists were unable to convince state officials to modify some of the regulations which governed their schools. Conversation with Ralph Yarnell, Maine Association of Christian Schools.
9. In Pennsylvania, the Keystone Christian Education Association was unable to push through a measure which would have deregulated many aspects of private religious schooling. Conversation with Henry S. Aschbrenner, Deputy Executive Director, Pennsylvania Catholic Conference. Fundamentalists were also unsuccessful to have legislation adopted in Maine and Nebraska. See O'Quinn, *Christian Schools to Continue to Fight State*, Central Maine Morning Sentinel, Aug. 10, 1981; Herman, *Church School dispute quite now but —*, Lincoln (Neb.) Journal, June 30, 1982. Fundamentalists in North Carolina and Alabama, however, were successful in having legislation adopted which effectively deregulated private religious education. 1979 N.C. Sess. Laws ch. 505 (codified at N.C. GEN. STAT. ch. 115C, art. 39 (Cum. Supp. 1981) (replacing N.C. GEN. STAT. ch. 115, art. 32 (1978)); Act of Apr. 6, 1982, No. 218, 1982 Ala. Acts —(amending ALA. CODE §§ 16-28-1, -3, -7, -8, -15, -23; 16-40-1; 16-1-11; 16-4-16).
10. See *infra* notes 72-83 and accompanying text.
11. As James Madison stated in the FEDERALIST PAPERS, "ambition must counter ambition . . . since justice is the aim of government." THE FEDERALIST No. 51 (J. Madison). Similarly, Justice Jackson contended in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943),  
 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.
- 319 U.S. at 639. John Stuart Mill expressed similar views in his essay *On Liberty*:  
 The worth of a State, in the long run is the worth of the individuals composing it; . . . A state which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.  
 (Crofts Classic ed.) 117-118.
12. Reflective of this view, Robert Kamenshine writes,  
 The use of public schools to instill political values poses a serious threat to the marketplace of ideas and the integrity of the democratic process. Children are particu-

If we truly cherish religious liberty, we should embody this freedom in our laws and judicial standards. If Christian educators can demonstrate that their students learn as much as their public school counterparts, the state should limit its regulatory role to core curriculum requirements and school safety.<sup>13</sup> If state laws and regulations infringe on a sincere religious belief, the courts should require that the state introduce "clear and convincing proof" that its regulatory scheme is the least intrusive means available to obtain some compelling state interest.<sup>14</sup> The dual focus of this article is an analysis of the positions and policy arguments made by state regulators and Christian educators and on the need for the courts to adopt a standard of review requiring state regulators to prove by clear and convincing proof their compelling state interest in the regulation of fundamentalist schools.

### THE INTERESTS OF CHRISTIAN EDUCATORS

Christian schools come in all shapes and sizes. Some are one-room schoolhouses which make use of self-paced curriculum packets; others are structured in much the same manner as public schools. Some are either affiliated with or part of a church or are independent. Common to all schools, however, is a strict adherence to an established interpretation of fundamentalist religious and social values.<sup>15</sup>

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larly susceptible to political indoctrination. As a consequence, the implementation of a political establishment prohibition (against state-selected ideologies) in this setting is crucial.

Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 COLO. L. REV. 1104, 1134.

Also supportive of this view, Chester Finn has commented,

The United States is a heterogeneous society in which people—individually, and in groups and communities—hold varied and sometimes quite divergent ideas about the desirable character and content of formal education. These differ among such dimensions as curriculum, pedagogical style, discipline, morality, values, religious content, and academic standards. Public policy should foster educational pluralism and diversity that are responsive to those differences within the society rather than seeking to impose a uniform or homogeneous definition of schooling.

Finn, *Public Support for Private Education II*, AM. EDUC., June 1980, at 9. Professors Kamenshine and Finn thus emphasize the need to produce graduates capable of independently and critically assessing American society. See Katz, *The Present Moment in Educational Reform*, 41 HARV. EDUC. REV. 342, 356 (1971).

13. See Devins, *supra* note 4.

14. See Devins, *A Fundamentalist Right to Education?*, NAT'L L.J., Feb. 21, 1983; Boothby, *Government Entanglement with Religion: What Degree of Proof is Required*, 7 PEPPERDINE L. REV. 613 (1980).

15. Peter Skerry, who conducted a study of Christian schools in North Carolina, noted:

The day begins with prayer, and pledges to both the American and the blue-and-white Christian flag. Each class begins with prayer, and meals with grace. . .

[A]lthough *Bible* study is only one part of the curriculum, all subjects are taught from a Christian perspective . . . One of the most distinctive features of these schools is the strict discipline code . . . Insubordination or undisciplined behavior of any sort is not tolerated . . . Each school also has a detailed dress code . . . [T]hese rules are merely the reflection of everyone's values, teachers and parents alike. Willingness to abide by them is the primary admission criteria . . . As a result the interaction between teachers and students is not marked by fear and intimidation but by mutual respect and friendliness.

Skerry, *Christian Schools Versus the IRS*, PUB. INTEREST, Fall, 1980, at 23-24.

The curriculum method utilized by Christian educators often varies considerably from school to school. The most popular curriculum form is the Advanced Christian Education Program (ACE). "The ACE method of instruction is a self-study program whereby students work at their own speed and progress through a series of learning packets on varying subjects, referred to as 'paces.' The ACE program is Bible-oriented in that passages from scripture are contained within the teaching materials. . . . [T]he ACE curriculum is currently being used in approximately 3,000 church schools throughout the United States. An additional 500 to 1,000 new schools are expected to utilize the curriculum when their doors open in [the next school year]."<sup>16</sup> Regardless of the curriculum form used, students in Christian schools generally do at least as well on nationally recognized achievement tests as their public school counterparts.<sup>17</sup>

Christian school teachers are hired on the basis of religious conviction, not academic qualifications.<sup>18</sup> Christian school teachers also receive extremely modest pay.<sup>19</sup> Thus it should come as no surprise that Christian school teachers feel they are pursuing a religious mission.<sup>20</sup> Proponents of the rights of Christian educators often argue that teacher certification laws are unfair because it might be extremely difficult to find an individual who satisfies both the school's religious criteria and state's academic standards.<sup>21</sup> Yet, at present, approximately seventy percent of Christian school teachers have graduated from a four-year college.<sup>22</sup>

Parents are actively involved in the running of Christian schools.<sup>23</sup> In Missouri, for example, sixty-three percent of the families provide volunteer service to the Christian school.<sup>24</sup> This active parental role is often pointed to by Christian school advocates as evidence that these

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16. *State v. Shaver*, 294 N.W.2d 883, 886 (N.D. 1980).

17. If anything, it appears that private sectarian schools are doing a better job with their students than the public schools. See *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 554-56 (1979) (Testimony of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International); Murren, *What Things are Caesar's?*, CHURCH & STATE, May 1980, at 6; BARTON & J. WHITEHEAD, SCHOOLS ON FIRE 49 (1980).

In *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), "the prosecutor in the trial of the *Whisner* case objected to the introduction of the Stanford Achievement Test scores on the Tabernacle Christian students as 'irrelevant and immaterial.' Apparently, the state took the position that compliance with the minimum standards was indispensable to an adequate education." Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. REV. 847, 886 (1978).

18. See Skerry, *supra* note 15, at 25-26; and Ball *supra* note 5, at 336-338.

19. See Skerry, *supra* note 15, at 25 and D. HAM, REASONS WHY PARENTS ENROLL THEIR CHILDREN IN FUNDAMENTALIST CHRISTIAN SCHOOLS, (Ph.D. dissertation, University of Missouri at Columbia, 1982).

20. See *supra* note 18.

21. See Ball, *supra* note 5, at 336.

22. See D. HAM, *supra* note 19, at abstract.

23. See Skerry, *supra* note 15, at 26.

24. See D. HAM, *supra* note 19, at abstract.

schools will be self-regulating without unnecessary and intrusive state interference. Attorney William Ball, for example, has commented that

[p]arents are not long going to invest money in schools which are worthless. Parents who care enough about their children to enroll them in private schools are, by and large, parents who are keenly interested in their children and willing to sacrifice for them.<sup>25</sup>

The Christian school movement is a national phenomenon of fairly recent origin. Although some schools were formed more than fifty years ago, the average age of the schools is less than six years.<sup>26</sup> Despite its recent growth, Christian schools still adhere to a well-defined educational philosophy. Consequently, state lawmakers and bureaucrats have an established factual base on which to make legislative and rulemaking determinations. Lawmakers' actions, however, are not predictable.

### Perspectives of Christian Educators

The growth of Christian schools can be explained by two interrelated phenomena. First, fundamentalists are dissatisfied with the academic and social environments of public schools.<sup>27</sup> Second, fundamentalists believe that public schools have become "secularized" so that religious values no longer have a place in public education.<sup>28</sup>

Fundamentalists are dissatisfied with the academic and social environments of the public schools for several reasons. The most significant reason is the perceived breakdown of the nuclear family. This is evidenced by the increased willingness of parents "to have the state take over formation of their children."<sup>29</sup> Fundamentalists find this unacceptable for two reasons. First, the fundamentalists believe that parents shape the future through the upbringing of their children.<sup>30</sup> Second, fundamentalists allege that the state, if left to its own devices, will create a monolithic educational structure which stamps out "the needed diversity for a truly free society."<sup>31</sup>

Fundamentalists are also fearful of the "moral breakdown" in our public schools associated with lack of discipline, sexual permissiveness, and drug and alcohol abuse.<sup>32</sup> This perceived breakdown is viewed as antithetical to the learning of both ethical and academic lessons. The moral corruption and intellectual decay among today's youth is attrib-

25. Ball, *supra* note 5, at 12.

26. See D. HAM, *supra* note 19, at 37-38.

27. See Devins, *supra* note 4; and Carper, *supra* note 3, at 281-282.

28. See Devins, *supra* note 4; J. WHITEHEAD, *THE NEW TYRANNY* 18 (1982), Whitehead & Colan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implication*, 10 TEXAS TECH L. REV. 1 (1978); and Rice, *supra* note 17. This notion—that public schools inculcate their students with secular values—was recently acknowledged in [Alabama school Government of Christian Schools prayer case].

29. W. BALL, *LITIGATION IN EDUCATION: IN DEFENSE OF FREEDOM* 14 (1977).

30. See J. WHITEHEAD, *supra* note 28, at 20-22.

31. J. WHITEHEAD, *supra* note 28, at 3. See also Ball, *supra* note 5.

32. See Carper *supra* note 3, at 281-282; and D. HAM, *supra* note 19.

uted to a number of factors, including television, lack of parental supervision, and lower expectations of children in the public schools.<sup>33</sup> Interestingly, these criticisms of public schools bear a striking resemblance to a number of studies undertaken to explain the decline of college entrance examination scores.<sup>34</sup>

These criticisms reflect a basic philosophical difference between Christian educators and the public school establishment. "Like the seventeenth-century Puritans, [fundamentalists] believe in the 'innate depravity of man.' Because they believe that the corrupt nature of humanity can be changed only through a supernatural infusion of Divine grace, religious 'conversion' becomes the basis of all education. Furthermore, since human nature is utterly depraved, children require strict supervision and authoritarian guidance."<sup>35</sup> In sharp contrast, fundamentalists see public education as operating under the premise that human nature is basically good,<sup>36</sup> which results in less supervision than necessary to keep students on the course of righteousness and dignity.

Finally, fundamentalists accuse the public school establishment of inculcating their students with a system of values known as "secular humanism."<sup>37</sup> Humanism signifies "the idea that men and women can begin from themselves without reference to the *Bible*, and by reasoning outward, derive the standards to judge all matters."<sup>38</sup> Fundamentalists object to the teaching of "secular humanism" for three reasons. First, they believe that God, as reflected in the *Bible*, is the proper source of all values.<sup>39</sup> Second, they claim that the humanistic value system is in a constant state of flux and thus is incapable of serving as the basis for consistent moral judgment.<sup>40</sup> Third, they feel that public school students are being denied access to important lessons whose source is the *Bible*.<sup>41</sup> This denial is a result of several Supreme Court decisions which prohibited the teaching of creationism,<sup>42</sup> organized prayer,<sup>43</sup> *Bible* readings,<sup>44</sup> and the posting of the Ten Commandments in the public schools.<sup>45</sup> Exacerbating this problem is the inclusion of courses in the public school curriculum, such as sex education and the evolution

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33. *Id.*

34. See, e.g., *On Further Examination: Report of the Advisory Panel on the Scholastic Aptitude Test Decline*, College Entrance Examination Board (1977).

35. Nordin & Turner, *More than Segregation Academies: The Growing Protestant Fundamentalist Schools*, 61 PHI DELTA KAPPAN 391, 392-93 (February, 1980).

36. See *id.* at 393.

37. See *supra* note 28.

38. J. WHITEHEAD, *supra* note 28 at 38.

39. See generally *id.*; and KIENEL *supra* note 3.

40. See J. WHITEHEAD, *supra* note 28 at 41-42, where American humanism is referred to as "a system of arbitrary absolutes, philosophical relativism that changes with opinion but that demands absolute submission to its arbitrary will of the moment."

41. D. HAM, *supra* note 19, at 75.

42. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

43. *Engel v. Vitale*, 370 U.S. 421 (1962).

44. *Abington School District v. Schemp*, 374 U.S. 203 (1963).

45. *Stone v. Graham*, 449 U.S. 39 (1980).

of man, which the fundamentalists find morally objectionable.<sup>46</sup>

All of these criticisms express disapproval of our society for fostering this educational enterprise. As Professor James Carper noted, "[t]o many evangelicals the public school exemplifies the trend they deplore in the changing American social order, such as uncertainty concerning sources of authority, dissolution of standards, waning of the Judeo-Christian value system, loosening of custom and constraint, scientism, and government social engineering."<sup>47</sup> Moreover, "[a] local fundamentalists church . . . is both homogenous and highly stable. It is the only organization which its members control at a time they feel [that] government institutions are out of control. It is often the only structure they trust and certainly the one in which they feel most comfortable, since much of their social as well as their spiritual life revolves around it."<sup>48</sup>

Many of the fundamentalists' criticisms of public education are based on their belief that the public school environment inculcates a set of values at odds with the types of moral lessons that they want to see their children learn. But the fundamentalists also seek to advance a particular set of religious values through their schools, rather than merely removing their children from a "hostile" public school environment. Christian schools, therefore, base their actions on two constitutionally protected rights: the general right of parents to direct the upbringing of their children,<sup>49</sup> and the religious liberty interest of parents to direct the religious upbringing of their children.<sup>50</sup>

Christian educators believe that private religious schools are mandated by God.<sup>51</sup> This belief on the part of the fundamentalists, that education is inherently religious, mandates noncompliance with state licensing procedures which grant broad authority to state boards of ed-

46. See D. HAM, *supra* note 19, at abstract.

47. Carper, *supra* note 8, at 281-82. Reflective of these considerations, the reasons for founding a Christian school are, in order of importance: 1) a desire for students to receive moral and religious instruction; 2) a desire to have students taught by Christian teachers; 3) a belief that public schools are academically inferior; 4) opposition to specific courses taught in public schools; and 5) a belief that there are discipline problems in the public schools. See D. HAM, *supra* note 19, at abstract. It should be noted that these schools are not formed in order to avoid school desegregation orders. See D. HAM, *supra* note 19; Nordin & Turner, *supra* note 35; and Skerry *supra* note 15 at 28-31.

48. Skerry, *supra* note 15, at 23 (quoting from *The Schools That Fear Built*).

49. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

50. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

51. This mandate has been stated:

First, the *Bible* teaches that children belong to the Lord (*Ezekiel* 18:4, *Psalms* 50:12) and that the Lord has given children to parents as a heritage (*Psalms* 127:3). Parents, as God's stewards, are commanded to teach their children in their belief—"in the nature and admonition of the Lord" (*Deuteronomy* 6:6, *Ephesians* 6:4). Finally, all people instructed to obey God's commands (*Proverbs* 22:6). Thus, God while delegating specific responsibilities to civil government (*Romans* 13:1-7; *I Timothy* 2:14; *I Peter* 2:13-17), has clearly staked out education as religious and doctrinal in content and wholly within the province of the local church.

SMITH, FIRST AMENDMENT LIMITATIONS ON STATE REGULATIONS OF RELIGIOUS SCHOOLS [Independent Writing Project: 1-11-80]. See also COOLEY, THE CHRISTIAN EDUCATION MANDATE (Berean Baptist Christian Academy).

ucation to promulgate "equivalent educational standards" for nonpublic schools.<sup>52</sup> For the fundamentalists, this authority in effect makes the state lord over their schools.

Fundamentalists also refuse, as a matter of religious conviction, to abide by far-reaching state regulations.<sup>53</sup> This refusal is based on the belief that the state education bureaucracy is hostile to the central religious mission of Christian schools.<sup>54</sup> In support of this contention, fundamentalist educators allege that the educational bureaucracy has been unduly influenced by anti-Christian thinkers.<sup>55</sup> Fundamentalists believe that the more the state seeks to make its private religious schools more like public schools through regulations, the less likely it is for Christian schools to fulfill their religious mission.

Another reason Christian educators refuse to follow many state regulations is because they view their schools as God's property.<sup>56</sup> For them, to concede that the state has the ultimate authority to regulate their schools would breach the New Testament command to "render, therefore, to Caesar the things that are Caesar's and to God the things that are God's."<sup>57</sup> Christian educators claim that the Christian school, as an inherently religious institution, is properly within God's province. Fundamentalists acknowledge, however, that some limited state regulation is appropriate to ensure that students learn basic subject areas in a healthy environment.<sup>58</sup> The fundamentalists are more concerned with

52. See *supra* note 31; Devins, *Fundamentalist School and the Law*, The Christian Science Monitor, Sept. 22, 1982, at 23; Smith, *supra* note 51, at 2-3; and Ball *supra* note 29.

53. See Ball, *supra* note 29; Ball, *supra* note 5; and Devins, *supra* note 52.

54. See J. WHITEHEAD *supra* note 28, at 9-14.

55. For example, the influential educational philosopher John Dewey contended in A COMMON FAITH: "I cannot understand how any realization of the democratic ideal as a vital moral and spiritual ideal in human affairs is possible without surrender of the basic division to which supernatural Christianity is committed." [quoted from J. WHITEHEAD, *supra* note 28, at 14].

56. See Smith, *supra* note 51; and Devins, *supra* note 52.

57. Matthew 22:21.

58. See W. BALL, *supra* note 29; W. BALL, CONSTITUTIONAL PROTECTION OF CHRISTIAN SCHOOLS, (1981); and Ball, *Law and the Educational Mission of Christianity*, Theology, News and Notes, (Dec. 1980), at 9. It should be noted that some fundamentalists are strict separationists and thus refuse to acknowledge that the state has some legitimate regulatory authority. See *The Police Lock a Baptist Church*, Christianity Today, Nov. 12, 1982. These "separationists" or "religious anarchists" refuse to raise the defense of excessive government involvement in Christian School lawsuits, claiming that to argue that excessive entanglement is impermissible is to concede that some government intervention is permissible. See Minnery, *Does David Gibbs Practice Law as well as the Preachers Church-State Separation?*, Christianity Today, April 10, 1981, at 48. This separationist tact has been criticized for both its failure to recognize that some government regulations are appropriate and its weakness as a legal argument. *Id.* William Bentley Ball offered the following criticism of the "separationists" in a recent speech:

While we may speak of governmental inadvertence against religious liberty, we must also take note of the mentality which holds that government is an alien body in our midst. It is "they" inevitably pitted against "us" . . . [Yet] "the government," in the American System is ourselves, "We the people . . . (G)overnment Agents frequently forget this, but let religious people not fail to remember it.

Ball, *Government as Big Brother to Religious Bodies*, reprinted in, GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, at 23-24 (D. Kelly ed. 1982).



the possibility that the state extend its reach and end the parents' control of their child's moral, spiritual, and educational upbringing.

Fundamentalist educators often challenge expansive state regulations governing their schools in court.<sup>59</sup> They usually argue that the enforcement of such laws and regulations would deprive them "of their liberty to freely carry out their religious mission in the form of Christian education and chill, if not destroy, the evangelical ministry of the pastor in the religious mission of the schools in their charge."<sup>60</sup> There is no reason to suspect that this claim is not sincere.<sup>61</sup>

### THE INTERESTS OF THE STATE

Education is one of a state's most compelling responsibilities. The state's interest in education was noted by the great educational reformer, Horace Mann, who said, "the true business of the schoolroom connects itself, and becomes identical, with the great interest of society."<sup>62</sup> Economist Milton Friedman claims that "a stable and democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens and without widespread acceptance of some common set of values. Education can contribute to both."<sup>63</sup> Education enables an individual to function as a member of society and to contribute positively to their community. In other words, education is: (1) necessary to the individual in that it prepares him for community life and (2) necessary to our society since it is a participatory democracy.

Supreme Court decisions on education have evidenced a judicial cognizance of the fundamental role that education plays in furthering

59. See *infra* notes 72-83 and accompanying text.

60. *Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982). (State's motion for summary judgment in Christian School lawsuit denied). Another claim typically made by fundamentalists is that:

[T]he public schools of today are overrun with an increase in crime, drug and alcohol addiction, teacher assaults, vandalism, and disrespect for authority and property. Additionally, secular humanism is the basic philosophy of the public education system . . . [It is] further maintain[ed] that, because their philosophy is Christian and that of the State Department of Education is not, the latter is not capable of judging the philosophy of [Christian] school[s]. Finally, because the state school laws require inspection of the school by the county superintendent, [Christian schools] cannot submit to control because the State has no right to inspect God's property."

*State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 806, 301 N.W. 2d 571, 579 (1981).

61. No court in a state regulation of Christian school lawsuit has held that the school's failure to comport with state regulations was not religiously motivated. In *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980), however, the North Dakota Supreme Court did hold that the religious school failed to demonstrate that a teacher certification regulation impacted on sincere religious belief. 294 N.W.2d at 894. Also, both the Fifth and Fourth Circuit Court of Appeals have held that sincere religious belief was not at issue in lawsuits involving Christian school compliance with section 1981 of the Civil Rights Act. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) and *Fiedler v. Marunco Christian School*, 631 F.2d 1144 (4th Cir. 1980). See *infra* notes 109 to 120 and accompanying text for a discussion of these cases.

62. *Education in a Democracy*, ANNALS OF AMERICA 365.

63. M. FRIEDMAN, CAPITALISM AND DEMOCRACY 86 (1962).

the interests of the individual and of the nation. The particular importance of education to a democratic society and to its citizenry was given classic expression in *Brown v. Board of Education*.<sup>64</sup>

Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society . . . in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.<sup>65</sup>

Although it has acknowledged education's fundamental role in American society, the Supreme Court has explicitly rejected the notion that education should be viewed as a fundamental interest.<sup>66</sup> The states, therefore, have broad discretion in establishing rules and regulations which govern both public and private schools. Not surprisingly, there are great variations in the sorts of educational philosophies and concomitant regulations which govern America's private schools.<sup>67</sup>

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64. 347 U.S. 483 (1954).

65. *Id.* at 493. Similarly, Justice Frankfurter, in his concurrence in *McCullum v. Board of Education*, 333 U.S. 203 (1948), called the public schools

the most powerful agency for promoting cohesion among a heterogeneous democratic people. . . . The public school is at once the symbol of our democracy and the most persuasive means for promoting our common density. 333 U.S. at 216.

In *Abington School District v. Schemp*, 374 U.S. 203 (1963), Justice Brennan's concurrence followed this line of thought when he noted:

Americans regard the public schools as a most vital civil institution for the preservation of a democratic system of government. . . . It is implicit in the history and character of American public education that the public school serve a uniquely public function.

374 U.S. at 230, 241-42.

66. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *See also* Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 PA. L. REV. 504 (1972). *But see* Coons, Clune & Sugarman, *Educational Opportunity A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969) and *Serrano v. Priest II*, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929, *cert. denied*, 432 U.S. 907 (1977).

67. It is important to note the following:

I. Diane Doerge Wilson reports that in a 1980 study Charles O'Malley, now head of the division of private education for the U.S. Department of Education, found that among the fifty states: (1) there is no consensus about the definition of a nonpublic school; (2) only five states have mandatory accreditation for nonpublic schools; (3) twenty-eight states have voluntary accreditation programs; (4) thirty-two states have voluntary or mandatory approval programs; and (5) six states have private school advisory committees. WILSON, *PUBLIC POLICY AND NON-PUBLIC SCHOOLS: A GENERAL OVERVIEW* 23 (1981);

II. In 1979, the National Association of Independent Schools, in a survey of state independent school regulations found that: (1) twenty-two states have specific course requirements that apply to nonpublic schools; (2) eighteen states have requirements about the number of instructional hours students must receive that apply to nonpublic schools; (3) three states require that students take a state regents examination; (4) sixteen states require that nonpublic schools adhere to all state standards that apply to public schools; (5) thirty states require some type of reporting of student curriculum or teacher information from nonpublic schools; (6) six states require mandatory competency evaluations of nonpublic school students, and similar legislation is pending in seven more states;

III. Patricia Lines noted in her 1982 report, *Private Education Alternatives and State Regulations*, (Education Commission of the States): "Acceptable ways of meeting the schooling requirement vary widely among states. Some states require certification of teachers and schools, some only approval and some only minimal evidence that schooling takes place. Some states . . . give state and local officials wide discretionary authority to excuse a child

The authority of the state to promulgate regulations which govern private sectarian schools is subject to a reasonableness standard. In *Runyon v. McCrary*,<sup>68</sup> the Supreme Court noted:

[W]hile parents have a constitutional right to send their children to private schools and . . . to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.<sup>69</sup>

The Court also noted in *Gillette v. United States*<sup>70</sup> that "neutral prohibitory or regulatory laws having secular aims may impose certain 'incidental burdens' on free exercise when the burden on First Amendment values is . . . justifiable in the terms of the Government's valid aims."<sup>71</sup> Although the determination of whether a regulation is reasonable ultimately rests with the judiciary, state legislators have wide discretion in formulating regulations to govern private schools.

State legislators have enacted, to varying degrees, regulations which require private sectarian schools to satisfy minimum standards in the following areas: (1) fire, health, and safety;<sup>72</sup> (2) curriculum;<sup>73</sup> (3) textbook selection;<sup>74</sup> (4) instructional time;<sup>75</sup> (5) teacher certification;<sup>76</sup>

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from the compulsory attendance requirement. . . . Some states have consciously deregulated their private schools. . . . [Some states have] consciously limited the extent to which the state board can regulate private schools. . . . Laws in about half the state permit instruction at home by a parent." *Id.* at 3-5;

IV. James Carper reported: "Bills which would to some degree free religious schools from state control have been introduced during the 1981 and 1982 legislative sessions in Vermont, Alabama, Nebraska, Iowa, Louisiana, Michigan, and Pennsylvania. In Illinois, the House of Representatives sustained Governor James Thompson's veto of a bill which would have exempted religious schools from state licensing. . . . In Iowa, a suit filed against a church-affiliated school was settled out of court in January 1982." Carper, *supra* note 8, at 301 n.67. See generally KINDER, THE REGULATION AND ACCREDITATION OF NON-PUBLIC SCHOOLS IN THE UNITED STATES, (Ph.D. dissertation, University at Missouri at Columbia, 1982).

68. 427 U.S. 160 (1978).

69. *Id.* at 178. See also authorities cited in Note, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801, 811-812 note 59.

70. 401 U.S. 437 (1971).

71. *Id.* at 462.

72. This sort of regulation was unsuccessfully challenged by fundamentalists in North Dakota. *State v. Shaver*, 294 N.W.2d 883 (1980). Fundamentalists, however, do not generally challenge this sort of regulation. See *supra* note 58.

73. Fundamentalists prevailed in their challenge to this type of regulation in Ohio and Kentucky. *State v. Whisner*, 47 Ohio St.2d 181, 351 N.E. 2d 750 (1976); *Kentucky State Board v. Rudasill*, 589 S.W. 2d 877 (Ky. 1979). The state prevailed in North Dakota, North Carolina, and Nebraska. *State v. Shaver*, 294 N.W. 2d 883 (N.D. 1980); *State v. Columbus Christian Academy No. 78* (Wake County, N.C., Super. Ct. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979); *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W. 2d 571 (1981). Cases are now pending in Maine, Michigan, Iowa, Nebraska, and Massachusetts. *Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982) (summary judgment granted); *Sheridan Road Baptist Church v. State* (Ingham County, Mich., Cir. Ct., Dec. 29, 1982) (appeal pending); *Pruessner v. Benton and State Board of Public Education* (Floyd County, Iowa, Dist. Ct. No. 23190); *State v. Bible Baptist Church* (Lincoln, County, Neb., Dist. Ct. No. 359); *Attorney General v. Grace Bible Church & Christian School* (Suffolk, Mass., Super. Ct., Civ. No. 54209) (also known as *Bailey II*).

74. Fundamentalists successfully challenged textbook selection provisions in North Carolina (*Columbus Christian Academy*, *supra* note 73) and Kentucky (*Rudasill*, *supra* note 73).

75. Fundamentalists have generally been unsuccessful in their challenges to instructional time

(6) zoning;<sup>77</sup> (7) consumer protection;<sup>78</sup> (8) student reporting;<sup>79</sup> (9) testing;<sup>80</sup> (10) state licensing;<sup>81</sup> (11) community interaction;<sup>82</sup> and (12) guidance services.<sup>83</sup> The most controversial of these regulations are programmatic ones which govern actual teaching practices in nonpublic schools, including curriculum, textbook, and teacher certification.

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statutes and regulations. "Kentucky and North Carolina legislation prohibiting private schools from operating on a term shorter than that of public schools and North Carolina regulations setting minimum hours for the school day and for daily teacher presence, were all upheld by the respective state courts without serious question." Note, *supra* note 69, at 821. The Nebraska Supreme Court also upheld an instructional time provision. *Faith Baptist*, 207 Neb. 802, 301 N.W.2d 571. An Ohio instructional time provision, however, was held unconstitutional. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750.

76. Teacher certification laws were found unconstitutional in Ohio, Kentucky, and Michigan. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750; *Rudasill*, 589 S.W.2d 877; *State v. Nobel*, No. S-7-91-9114-A, slip op. (Mich. Dist. Ct., Dec. 12, 1979). Teacher certification laws were upheld in North Carolina, North Dakota, and Nebraska. *Columbus Christian Academy*, (Wake County, N.C., Super. Ct.); *Shaver*, 294 N.W.2d 883; *Faith Baptist*, 207 Neb. 802, 301 N.W.2d 571. Cases are now pending in Maine, Michigan, Iowa, and Nebraska. *Bangor Baptist, Sheridan Road, Pruessner*, and *Bible Baptist*, *supra* note 73.
77. Zoning might represent the largest subject of litigation between fundamentalists and the state (conversation with Charles Craze, Fundamentalist Attorney). One case where fundamentalists prevailed was the New Hampshire case, *City of Concord v. New Testament Baptist Church*, 118 N.H. 56, 382 A.2d 377 (1978). One case where fundamentalists were defeated was in Oregon. *Damascus Community Church v. Clackamas County*, 45 Or. App. 1065, 610 P.2d 273 (1980).
78. Although not involving a fundamentalist school, a Puerto Rican consumer protection statute was held unconstitutional as it applied to religious schools. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979).
79. Fundamentalists generally do not challenge student reporting requirements. Where they have, they have lost. See, e.g., the Massachusetts Supreme Court decision, *Attorney General v. Bailey*, 1, 386 Mass. 367 (1982).
80. "Christian schools have generally been willing to submit their 'product' voluntarily to reasonable evaluation by the State through achievement testing." Note, *State Regulation of Private Religious Schools in North Carolina—A Model Approach*, 16 WAKE FOREST L. REV. 405, 416 (1980). Christian school leaders, however, have expressed concern that the state may impose otherwise impermissible curriculum requirements through extensive testing. See W. BALL, *supra* note 29, at 337-338. It should also be noted that many Christian school leaders and some courts contend that the state can satisfy its interest in education by requiring that Christian school students take and perform satisfactorily a nationally recognized achievement test. See *Murren*, *supra* note 17, *Rudasill*, 589 S.W.2d at 884. See also *Devins*, *supra* note 14. This position, however, has been rebuked by some commentators and courts. See Note *supra* note 69, at 817 and *Faith Baptist*, 207 Neb. at 815-16, 301 N.W.2d at 579-80.
81. Fundamentalists generally challenge broad state licensing laws which permit state education bureaucracies to promulgate regulations governing equality of education. In reference to this legislation, William Ball has commented:  

[Much of it] has been sloppily drafted . . . much of the regulatory matters . . . [are] incredibly poor stuff, embracing leaking definitions, internal contradictions, resolute departures from statutory authority, vagueness, all manner of unenforceable precautionary language, and, withal, greedy, unconstitutional overreaching in every direction.

W. BALL, *supra* note 29, at 10-11. Despite these criticisms, courts have upheld this general authority in Hawaii, North Carolina, North Dakota, and Nebraska. *State v. Fellowship of Christian Pilgrims*, — Hawaii —, 651 P.2d 473 (1982); *Columbus Christian Academy* (Wake County, N.C., Super. Ct.); *Shaver*, 294 N.W.2d 883; *Faith Baptist*, 207 Neb. 802, 301 N.W.2d 571. Fundamentalists have prevailed, however, on this issue in Ohio, Kentucky, and Vermont. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750; *Rudasill*, 589 S.W.2d 877; *State v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976). But see *State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 415 N.E.2d 279 (1980). Cases are now pending in Maine, Michigan, and Nebraska. *Bangor Baptist, Sheridan Road, Bible Baptist*, *supra* note 73.
82. Fundamentalists successfully challenged community interaction provisions in Ohio. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750; *Rudasill*, 589 S.W.2d 877.
83. This sort of provision was found unconstitutional in Kentucky *Rudasill*, 589 S.W.2d 877.

States with programmatic regulations contend that such regulations are necessary to assure that "students in nonpublic schools attain a certain minimum standard of education necessary for the welfare of the child and society."<sup>84</sup>

Considering the great diversity in approaches to implementing these regulations and the fact that there is no known correlation between any programmatic state regulation and educational achievement, it seems that the threshold decision "to regulate" and the subsequent decisions of "what to regulate" is, for the most part, a matter of abstract (albeit sincere) policy preferences among state lawmakers. State lawmakers justify their decision to regulate private schools under one of two competing rationales, namely the "other guy" approach and the "cookie cutter" approach.<sup>85</sup> The "other guy" approach holds that if there are no regulations, parents will abuse the system and cause the "miseducation" of their children.<sup>86</sup> Under this rationale, regulations are appropriate in those instances where a state cannot afford to trust parents to direct the upbringing of their children.<sup>87</sup> The "cookie cutters" approach holds that socialization is as significant a part of schooling as the learning of academic lessons. Thus, under the "cookie cutter" approach, the state ought to make private schools as much like public schools as the constitution permits. In other words, cultural pluralism, for the "cookie cutter" is a negative.

## CONSTITUTIONALLY PROTECTED INTERESTS

### The Right of Parental Control

In the 1920's, the Supreme Court decided three cases which recognized that the state was limited in the types of regulations it could impose on private schools. The first case, *Meyer v. Nebraska*,<sup>88</sup> involved a state regulation which required that English be the language of instruction in all schools in the state through the eighth grade. Under this

84. S. WALTHER, STATE REGULATION OF NONPUBLIC SCHOOLS 27 (1982) (Ph.D. Dissertation).

85. These labels are borrowed from Robert Baker's essay, *Statute Law and Judicial Interpretation in THE TWELVE YEAR SENTENCE* (Rickenbecker ed. 1974). Mr. Baker used these two labels to explain alternative rationales for compulsory education.

86. This rationale does not extend to fears—on the part of the state—that parents will be tricked into sending their children to fraudulent private schools. Curiously, this notion that the state ought to be paternalistic in its treatment of parents as consumers for their children's education has never been advanced by the state. William Ball sought to discredit this type of parent paternalism as a possible rationale for state controls over nonpublic education Ball claimed:

I believe that the parents, the children and the public are well protected by the "parent market" factor. There are plenty of laws to protect parents and children against fraudulent or dangerous schools. These laws can be, and are, enforced in all fifty states, and there is no good reason for imposing an overlay of additional structures of law in view of that fact.

W. BALL, *supra* note 58, at 12.

87. Different people, obviously, will draw this line in different places. For example, a B.F. Skinner type would permit for fairly intrusive regulations under an "other guy" rationale. On the other hand, a John Stuart Mill type would allow only the slightest amount of regulation.

88. 262 U.S. 390 (1923).

regulation, a private school teacher had been held criminally culpable for teaching German to an elementary school student. The Court found the regulation unconstitutional because, "[a teacher's] right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] amendment."<sup>89</sup>

Expanding on *Meyer*, the Court in *Pierce v. Society of Sisters*,<sup>90</sup> explicitly recognized the right of parents to direct the upbringing of their children. In *Pierce*, the Court held unconstitutional an Oregon statute which required all children to attend public schools. The Court ruled that the State could not outlaw private schooling and that

[t]he fundamental theory of liberty upon which all government in this Union repose, excludes any general power over 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.<sup>91</sup>

In the last of the 1920's decisions, *Farrington v. Tokushige*,<sup>92</sup> the Court held unconstitutional a statute which sought to promote the "Americanism" of pupils attending foreign language schools in the territory of Hawaii. This legislation "empowered the territorial government to prescribe the schools' courses of study, entrance and attendance qualifications, and textbooks; to require their teachers to satisfy certain standards; to limit hours of operation and the pupils who may attend them; to freely inspect material, facilities and teaching; and to collect fees, issue permits and require reporting to insure compliance."<sup>93</sup> The Court held that these regulations violated the parents' due process rights and their right to control their children's education.<sup>94</sup>

The significance of the right of parental control to future challenges of state regulation is questionable. First, the regulations involved in the *Pierce*, *Meyer*, and *Farrington* cases were unusual. The regulation

89. *Id.* at 400.

90. 268 U.S. 510 (1925).

91. *Id.* at 535. The Court, however, recognized that:

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

*Id.* at 534.

92. 273 U.S. 284 (1927).

93. S. WALTHER, *supra* note 84, at 39.

94. The Court stated:

They give affirmative direction concerning the intimate and essential details of such schools, their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks. Enforcement of the Act probably would destroy most, if not all, of them; and, certainly it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child.

273 U.S. at 298.

in *Meyer* was not related to a legitimate state interest, and the statutes in *Pierce* and *Farrington* would have completely eliminated the private school options. Most state regulations which apply to private religious schools are related to a legitimate state interest and are not as obtrusive as in the 1920's cases.<sup>95</sup> Second, the judiciary in the 1920's was extremely protective of individual rights which seemed threatened by any form of governmental action.<sup>96</sup> Presently, the Supreme Court explicitly recognizes the constitutionality of reasonable state regulations of private schools which promote a compelling state interest in education. In *Board of Education v. Allen*,<sup>97</sup> for example, Court observed that

[s]ince *Pierce*, a substantial body of case law has confirmed the power 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.<sup>98</sup>

In other words, "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."<sup>99</sup> Numerous other Supreme Court decisions have recognized the rights of states to impose reasonable regulations on its private schools.<sup>100</sup> But the Supreme Court has yet to determine where the line separating reasonable from unreasonable state regulations should be drawn.<sup>101</sup>

### The Religion Clauses

Fundamentalist Christian educators claim that a constitutionally unjustifiable stranglehold is being placed on their religious liberty by state laws and bureaucracies. Countering the fundamentalists' position, the state alleges that the existing structure of state laws is the least intrusive means available to satisfy the state's compelling interest in the education of its young. The resolution of these conflicting views of state authority is primarily based on the Free Exercise and Establishment clauses of the First Amendment.<sup>102</sup> The Free Exercise clause pro-

95. See, e.g., *supra* notes 65-77 and accompanying text.

96. LAW AND PUBLIC EDUCATION 32 (Goldstein & Gee ed. 1980).

97. 392 U.S. 236 (1968).

98. *Id.* at 245-247.

99. *Id.* at 247.

100. See references listed in Note, *supra* note 69, at 811-812 n.59.

101. See Devins, *supra* note 14.

102. In addition to these First Amendment claims, fundamentalist educators often challenge state laws and regulations on void-for-vagueness and due process grounds. See, e.g., *Bangor Baptist*, 549 F. Supp. 1208; and *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750. The fundamentalists successfully challenged Ohio's regulatory scheme on both of these grounds in *Whisner*.

On the void-for-vagueness claim, the fundamentalists' success can be attributed to the inability of Ohio's Director of Elementary and Secondary Education to clearly articulate the meaning of the regulations. This is borne out in the Director's cross-examination by defense council:

Q. The minimum standard on page 22 states: 'educational facilities, pupil-teacher ratio, instructional materials, and services at the elementary level are comparable

hibits the government from unnecessarily interfering in religiously based practices. The Establishment Clause, in part, bars the state from fostering an excessive government entanglement with religion.

*The Free Exercise Clause.* The test normally applied in determining

to those of the upper levels'. Now is that a standard which governs elementary schools? What does that provision means to you, Mr. Brown?

- A. It means that the elementary and secondary should be a comparable school system, that the secondary should not assume and take away all the money and infringe upon the elementary. There should be an equality of the money, staff, and so forth.
- Q. Now, Mr. Brown, take as an example the administrator of Tabernacle Christian School. He reads this statement and he is saying, 'What does the state want of me?' What does it require of us? And he reads, my educational facilities, our pupil-teacher ratio, our instructional materials and our services at this elementary level must be comparable to those of the upper levels. What do the words, 'upper levels,' means? Does it mean high school?
- A. Comparing between elementary and secondary.
- Q. 'Upper levels' refers to secondary—what part of a secondary level is referred to? What grade of high school is referred to?
- A. Normally . . . ninth through twelfth.
- Q. Normally ninth through twelfth. Are you telling me the elementary school must then be comparable to grades nine through twelve, all four grades of high school, in ratio, services, facilities, and materials?
- A. The comparability there would be as far as one school handling elementary and secondary. There would be equitable expenditures between the two.
- Q. The regulation speaks of educational facilities. What is an educational facility, Mr. Brown?
- A. It is a school building.
- Q. It is a school building. It is not an expenditure, it is a school building, and my elementary school building must then be comparable to high school building. Is that what you told us this means?
- A. If you have a high school.
- Q. What if you don't have one?
- A. Then you can't compare it.
- Q. Mr. Brown, do you understand what this provision means?
- A. Yes.

W. BALL, *supra* note 29, at 11-12.

On the due process claim, the *Whisner* court held that the state violated the right of parents to direct the upbringing of their children. This general right is based in the due process clause. See discussion of *Meyer*, *Pierce*, and *Farrington* *supra* notes 88 to 96 and accompanying text. The *Whisner* Court held:

The "minimum standards" under attack herein effectively repose power in the state Department of Education to control the essential elements of nonpublic education in the state . . . [Consequently,] the right of appellants to direct the upbringing and education of their children in a manner which they deem advisable, indeed essential, and which we cannot say is harmful, has been denied by application of the state's "minimum standards" as to them.

351 N.E.2d at 770.

Other courts have not ruled for the fundamentalists on these grounds noting that "The Ohio minimum standards were self-contradictory and extreme in their effort to achieve equivalency in public and private education." *Shaver*, 294 N.W.2d at 898. See also *Faith Baptist*, 207 Neb. at 814-15, 301 N.W.2d at 578-79.

It should be noted that the First Amendment claim (the right of parents to direct the religious upbringing of their children) is a stronger claim than the due process a stronger claim. See *Runyon v. McCrary* 427 U.S. 160, 167 (1976) and *Wisconsin v. Yoder* 406 U.S. 205, 215-16 (1972). Also, a statute found unconstitutional on void-for vagueness could be recrafted so as to be clear but just as intrusive.

Finally, fundamentalist separationists do not raise the establishment clause defense (although they will make due process and void-for vagueness claims). See *supra* note 58. See also *Wisconsin v. Yoder*, 406 U.S. 205, 215-34 (1972).



whether regulation of religiously motivated conduct violates the free exercise clause requires a three-part determination:

- (1) whether the challenge is motivated by, and rooted in, a legitimately and sincerely held religious belief;
- (2) whether and to what extent state regulations burden free exercise rights; and
- (3) whether any such burden is justified by a sufficiently compelling state interest.<sup>103</sup>

Government regulation which significantly burdens the free exercise of religion cannot withstand constitutional challenge unless it represents "the least restrictive means to achieve some compelling state interest."<sup>104</sup> But the exemption of a religious activity from regulation is not constitutionally required where it would "unduly interfere with fulfillment of the (compelling) government interest."<sup>105</sup>

The starting point in any free exercise clause analysis is a recognition that although laws cannot interfere with mere religious beliefs and opinions, they may interfere with practices. In *Reynolds v. United States*,<sup>106</sup> the Supreme Court explained, in upholding the conviction of a Mormon under a federal anti-polygamy statute, that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."<sup>107</sup> In

103. *Bangor Baptist*, 549 F. Supp. at 1217. The free exercise standard was articulated in a significantly different manner by the U.S. Supreme Court in *Thomas v. Review Board*: "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." 450 U.S. 707, 718 (1981). Under *Thomas*, once a showing has been made that religious practice is burdened by a governmental program, the state must demonstrate both that its regulation furthers some compelling interest and that the regulation is the least restrictive means available for furthering that interest. Apparently, the *Thomas* test does not address questions such as: to what extent does the government program infringe on religious practice or is the religious liberty interest so strong as to overbalance a compelling state interest. The *Yoder* test does raise these questions.

Because of these differences, it is hard to say whether a definitive standard of review exists in free exercise clause litigation. In applying the *Yoder* test, one court recently noted:

The constitutional analysis of cases arising under the free exercise clause is generally tailored to the particular factual situation at hand. This approach is different from . . . cases arising under the establishment of the religious clause . . . where a well-enunciated and broadly applicable test has been established.

*State v. Shaver*, 294 N.W.2d at 890-91.

Others, however, have criticized the free exercise standard as being too rigid in application. Paul Marcus, for example, contended that:

The major inadequacy of the current balancing test . . . is its failure to encompass a necessary third step (an ad hoc balance of the importance of the state's interest against the importance of the individual's interest) in its review. The Court takes its first step in determining whether they have been infringed by the state. It then takes the second step in deciding whether or not the state has a compelling interest for its action, an interest which could not be promoted by any less restrictive action. If the state interest is compelling, the Court stops and the state automatically wins, even if the individual's interest is exceptionally compelling.

Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1245. See also Weeks & Devins, *First Amendment Free Exercise Protections*, LEX COLLEGIUM, Summer 1980, at 1.

104. *Thomas*, 450 U.S. at 718.

105. *United States v. Lee*, 455 U.S. 252 (1982).

106. 98 U.S. 145 (1878).

107. The Court contended that its decision was based in the principles of organized government:

other words

the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.<sup>108</sup>

Thus while some degree of government regulation over religious activities is permissible, striking a balance between legitimate governmental regulation and impermissible government dominion is a task that the judiciary confronts. Free Exercise Clause analysis is triggered when some state action infringes upon an individual's right to freely practice his religion. The threshold issue in free exercise litigation, therefore, is a determination of "the magnitude of the statute's impact upon the exercise of religious belief."<sup>109</sup>

In *Brown v. Dade Christian Schools Inc.*,<sup>110</sup> a plurality of the Fifth Circuit Court of Appeals rejected Dade Christian's contention that its segregationist admissions policy was grounded in religious doctrine. For that Court,

[although] a belief [need not] be permanently recorded in written form to be religious in nature . . . the absence of references to school segregation in written literature stating the church's beliefs . . . is strong evidence that school segregation is not the exercise of religion.<sup>111</sup>

Additionally, some courts have held that, to be cognizable for First Amendment purposes, a belief must be central to the religion.<sup>112</sup> In *Sequoyah v. Tennessee Valley Authority*,<sup>113</sup> for example, the Court of Appeals for the Sixth Circuit applied the "centrality of belief" concept to deny the Cherokee Indian Nation injunctive relief to prevent the flooding of land sacred to the Cherokee Nation.

Granting as we do that the individual plaintiffs sincerely adhere to a

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Can a man excuse his (illegal) practices . . . because of his religious belief? To permit this would be to make the professed doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

*Id.* at 166-167.

108. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

109. *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980). But see the discussion of the *Thomas* standard, *supra* note 103, which suggests that the threshold question is whether the government action negatively impacts on religious belief.

110. 556 F.2d 310 (5th Cir. 1977). The Christian school involved in *Brown* claimed that it was not bound by the Supreme Court decision which held that minority students could not be denied admission to private schools solely because of their race. *Runyon v. McCrary*, 427 U.S. 160 (1976). The basis of this decision was the right to contract protection of § 1981 of the Civil Rights Act. The *Runyon* Court, however, explicitly left open the question of whether there was a valid free exercise defense to this § 1981 right.

111. 556 F.2d at 312. See also *Fiedler v. Marunco Christian School*, 631 F.2d 114 (4th Cir. 1980) where the court held that a church school could not raise a free exercise clause defense since it did not demonstrate that its pastor's arguably religious belief in racial separation was the church's belief.

112. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 859-65 (1978).

113. 620 F.2d 1159 (6th Cir. 1980).

religion which . . . draws the spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from their way of life, the cornerstone of their religious observance, or plays the central role in their religious ceremonies or practices.<sup>114</sup>

Under this restrictive *Dade Christian-Sequoyah* view, free exercise analysis will be triggered if the belief (1) is clearly expressed either in the literature or traditions of religion and (2) is central to their religion. Most courts do not follow the *Dade Christian-Sequoyah* view, and for good reason.

As Judge Goldberg pointed out in a special concurrence filed in *Dade Christian*:

One person's heresy can be another's religion. It is extremely important that religion be defined in such a manner that labeling does not become the touchstone of constitutional analysis. Religions can have abhorrent principles; most religious practices are benign, benevolent, and beneficent. But we should not judge a religion by its practices. One era's spiritual error is another's heralded religion.<sup>115</sup>

Supreme Court precedents support the Goldberg view.<sup>116</sup> In *United*

114. 620 F.2d at 1164. See also *Frank v. Alaska*, 604 82d 1068 (1979); *People v. Woody*, 394 82d 813 (1964); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

115. *Brown*, 556 F.2d at 317 (Goldberg, J., special concurrence).

116. Laurence Tribe, for example, contends that "For the free exercise clause . . . all that is 'arguably religious' should be considered religious in a free exercise analysis." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 828 (1978). This contention is supported by a number of Supreme Court decisions. In *United States v. Ballard*, the Court held that "the truth or verity of religious doctrines or beliefs" could not be considered by a judge or jury without violating the free exercise clause. 322 U.S. 7-8, 96 (1944). Similarly, in *Fowler v. Rhode Island*, the Court held that "it is not the business of courts to say what is a religious practice or activity for one group is not religious under the protection of the First Amendment." 345 U.S. 67, 69-70 (1953).

The fact that anything "arguably religious" ought to trigger free exercise clause analysis does not displace the "centrality of belief" standard from free exercise clause analysis. Under the *Yoder* test, "centrality" is clearly a significant factor in the determination of whether the government imposed infringement on religion is justifiable. At the same time, a belief which is not the sine qua non of a particular faith still ought to be protected by the free exercise clause. See L. TRIBE at 862. Additionally, the argument that courts should assign the same value to all beliefs seems well-founded. As J. Morris Clark noted:

When the objector is a member of a traditional religion, it may in some cases be possible to determine the strength of his belief by the relationship it bears to the theology as a whole. Some sins are venial, others mortal. But the difficulty of pronouncing judicially upon matters of theological complexity must be emphasized: as one recent Note has aptly observed, "Where an act is ritualistic and the government contests its centrality to the particular religion the courts must act as the final arbiter in questions of religious doctrine-questions more appropriately decided by prelates than judges."

Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 343 (1969).

Finally, the "centrality" concept lends itself to arbitrary application. The North Dakota Supreme Court, in *State v. Shaver*, for example, held that a perusal of the record fails to disclose a deeply-rooted religious conviction against the use of certified teachers in the Bible Baptist School." 294 N.W.2d at 894. The basis of this conclusion was the fact that the school would permit certified fundamentalist teachers to teach at the school. This reasoning is misguided for it assumes that there will be a sufficient number of certified fundamentalist teachers ready, willing, and able to teach at the school. See *supra* note 28. Deference to the sincerity and veracity of religious belief, however, does not preclude some judicial inquiry to guard against fraudulent religious clause claims. According to Professor Tribe, "full protection of the values underlying the first amendment suggests that any test of sincerity as a

*States v. Seeger*,<sup>117</sup> for example, the Court defined "sincere religious belief" in very broad terms. Construing a statutory requirement that military conscientious objector status should be based in belief "in a relation to a Supreme Being," the Court characterized the question as

whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption where such beliefs have parallel positions on the lives of their respective holders we cannot say that one is "in relation to a Supreme Being" and the other is not.<sup>118</sup>

Thus some commentators have noted that individual morality can be characterized as a sincere religious belief.<sup>119</sup> This standard makes sense.<sup>120</sup> There is no reason to suspect that an allegation of belief is insincere, unless some "clear and convincing" proof suggesting otherwise is adduced at trial.

The line distinguishing permissible from impermissible government conduct which infringes on religious freedom is not clearly drawn.<sup>121</sup> This confusion results from a standard of review in free exercise litigation structured so as to grant the fact finder great discretion in determining both the nature of the infringement on religious liberty and whether the state is using the least restrictive means available to it to further some compelling government interest.<sup>122</sup> Under this standard the government clearly cannot justify a particular regulatory scheme by the mere assertion that it has jurisdiction over the subject matter in question. According to Professor Laurence Tribe:

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prerequisite of exemption must be strictly limited to inquiries of this relatively neutral sort (publications or public claims of religious claimants), so that agents of government cannot readily bend the test to their religious prejudices." L. TRIBE, at 862. It should also be noted that an extensive government investigation into the "centrality of belief" in a religious liberty claim might independently violate the entanglement prong of the establishment clause test. See *infra* notes 132 to 139. Finally, the risk of fraudulent claims is one that we must take because "no one would limit the first amendment to the official orthodoxy of the relatively few religions that have elaborate dogmas." Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1080 (1978).

117. 380 U.S. 163 (1965).

118. *Id.* at 166.

119. See *Welsh v. United States*, 398 U.S. 333, 342-343 (1970) (purely ethical and moral considerations held to be religious), and J. WHITEHEAD *supra* note 28, at 108.

120. Religion is clearly a personal matter and thus it is proper for the courts to recognize it as such. This "individualization" of religion was recently recognized by the Supreme Court in *Thomas v. Review Board*, 450 U.S. 707 (1981). In *Thomas*, the Court upheld Thomas' First Amendment claims to receive employment compensation because he could not in good conscience assist in the manufacture of Army tanks. In *Thomas*, the Court based its free exercise analysis on the premise that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. Consequently, the Court did not find controlling the facts that Thomas was struggling with his beliefs; that he was not able to articulate his beliefs precisely; or that other members of the same religious order could work in the munitions plant. Instead, the Court claimed that:

Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court . . . is to determine whether . . . petitioners terminated his work because of an honest conviction that such work was forbidden by his religion.

450 U.S. at 716.

121. See *Thomas v. Review Board*, 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting).

122. See *Devins*, *supra* note 14.

In applying the least intrusive alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exemption with the state's usually much greater interest in maintaining the underlying rule of program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.<sup>123</sup>

Professor Marcus summarizes the results of earlier free exercise cases as follows:

The free exercise "losers" have been Mormons who have served life sentences for practicing polygamy, and independently lost the right to vote; conscientious objectors who could not attend state-run universities, and could not, for a period, become naturalized citizens of the United States; Jehovah's Witnesses who, for a time, would be required to pay flat license fees to sell their religious text, and still presumably can be prohibited from having their children sell or distribute religious literature in public; and Black Muslims, who have had an uphill battle in asserting their right to practice their religion while in prison.<sup>124</sup>

Despite Supreme Court decisions permitting restrictions on religious liberty in a number of areas, the Supreme Court has been more responsive to religious liberty claims for the past twenty years.<sup>125</sup>

The turning point in Supreme Court free exercise analysis was the 1963 *Sherbert v. Verner*<sup>126</sup> decision. *Sherbert* upheld a Sabatarian's right to refuse Saturday work and still receive unemployment benefits. In *Sherbert*, the Court promulgated the compelling interest-least restrictive means standard.<sup>127</sup> The Court also established the fundamental rule that

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. . . . Government may [not] . . . penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . nor employ the taxing power to inhibit the dissemination of particular religious views.<sup>128</sup>

This rule, although framed in terms of economic benefits or penalties, is equally applicable to government regulation. In the case of government regulations contrary to religious beliefs, an individual or institution will be pressured to forego its conflicting religious belief or else risk such government sanctions as jail sentence or the forceable closure

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123. L. TRIBE, *supra* note 112, at 855.

124. Marcus, *supra* note 103, at 1219.

125. See Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980).

126. 347 U.S. 398 (1963).

127. *Id.* at 407-09.

128. *Id.* at 402.

of the nonconforming operation.<sup>129</sup>

The ultimate issue in distinguishing permissible from impermissible government action is the degree of proof required in applying the *Sherbert* test.<sup>130</sup> If the government need only demonstrate that its regulation is arguably the least restrictive means available to achieve some compelling government interest, the state will have considerable discretion in promulgating regulations which impact on religious freedom. If the government must introduce "clear and convincing" evidence that its regulatory scheme satisfied the least restrictive means-compelling interest standard, however, the state will be forced to act very cautiously when it promulgates regulations which impact on religious liberty interest.

*The Establishment Clause.* The establishment clause requires that government action, "first, must reflect a clearly secular legislative purpose . . . second, [it] must have a primary effect that neither advances nor inhibits religion . . . and, third, must avoid excessive governmental entanglement with religion."<sup>131</sup> In *Bangor Baptist Church v. State*,<sup>132</sup> the court discussed the importance of the excessive entanglement concept in establishment clause litigation:

An unconstitutional entanglement generally involves 'the government's continuing monitoring or potential for regulating the religious activity under scrutiny.'

. . . 'In determining whether there is entanglement, the question is "whether particular acts in question are intended to establish or interfere with religious beliefs or practices or have the effect of doing so."'<sup>133</sup>

The excessive entanglement prong of the establishment clause is often viewed as a list of prohibited entanglement that government may *not*:<sup>134</sup>

- (1) involve itself in "continuing day-to-day relationships" with such pervasively religious schools;
- (2) have relationships with church-schools which involve an "element of governmental evaluation and standards;"
- (3) carry out legislation or regulations which create situations readily leading to "confrontations and conflicts" between government and churches;

129. This is precisely what happened in Nebraska where a fundamentalist pastor went to jail after refusing to comport with state regulations governing his church school. While in jail, the state had shut down his school. (It should be noted that a court of final determination had previously upheld the constitutionality of these regulations.) See Miller, *Fundamentalists Fight Nebraska over School*, N.Y. Times, Oct. 22, 1982, at A1; *The Police Lock a Baptist Church*, *supra* note 58.

130. See Boothby, *supra* note 14.

131. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (citations omitted).

132. 549 F. Supp. 1208 (D. Me. 1982).

133. *Id.* at 1221 (citations omitted).

134. W. BALL, MEMORANDUM TO OUR FUNDAMENTALIST CHRISTIAN FRIENDS AND OTHER FRIENDS OF RELIGIONS LIBERTY, Apr. 14, 1981, at 3-4 (case citations omitted).

- (4) have "programs whose very nature is apt to entangle the state in details of administration;"
- (5) have a "sustained and detailed relationship [with church institutions] for enforcement of statutory and administrative standards;"
- (6) employ, in respect to relationships between teachers and children in church-schools, "comprehensive methods of surveillance and control;"
- (7) engage in inspection of church institutional records;
- (8) carry out legislation or regulations which create situation requiring "negotiations" between church institutions and government;
- (9) have relationships with church institutions which have *even the "potential"* for the foregoing entanglements.

Some degree of government entanglement is permissible. Churches, for example, are presently subject to both tax and audit in regard to their business income.<sup>135</sup> Once government involvement has been established, the state must demonstrate that its regulatory scheme meets the least restrictive means-compelling interest test.<sup>136</sup> In *Surinach v. Pesquera de Busquets*,<sup>137</sup> the Court of Appeals for the First Circuit stated that:

in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent to which the Constitution will not countenance.<sup>138</sup>

Establishment clause concerns, however, are not triggered unless there is some risk that governmental regulations will impose a "superior regime of official orthodoxy"<sup>139</sup> on a religious belief or practice.

135. See Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 507 (1981); and Worthing, *Government Surveillance of Religious Organizations*, 23 J. CHURCH & STATE 551 (1981).

136. See *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 79-80 (1st Cir. 1979) and *Bangor Baptist*, 549 F. Supp. at 1222. See also *Thomas*, 450 U.S. 707 (1981), and *Sherbert*, 374 U.S. 398 (1963).

137. 604 F.2d 73 (1st Cir. 1979).

138. *Id.* at 75-76.

139. Brief for Petitioners (Bob Jones University) at 31, *Bob Jones University v. United States* 81-3. Violations of the excessive entanglement prong of the establishment clause can be made prospectively by a court. This is evidenced by the Seventh Circuit Court of Appeals decision in *Catholic Bishop of Chicago v. N.L.R.B.*

The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only, but it is sufficient to strike the aid down that a reasonable likelihood of possibility of entanglement exists.

559 F.2d 1112, 1126 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 409 (1979). Thus "the danger that pervasive modern governmental power will ultimately intrude on religion [is in] conflict with the Religion Clauses." Week and Devins, *supra* note 158, at 2. As James Madison stated in his *Memorial and Remonstrance Against Religious Assessments*:

[I]t is proper to take alarm at the first experiment on our liberties . . . the free men of American did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.

Quoted in *Everson v. Board of Education*, 330 U.S. 1, 63 (1977).

## THE SOLUTION

The courts thus far have been unable to provide consistent guidance either to the states or to the fundamentalist schools involved in state regulation lawsuits.<sup>140</sup> In fact, many of the existing decisions are totally at odds with each other.<sup>141</sup> And this includes decisions from the same state court<sup>142</sup> and decisions involving identical regulations—all applying the “same” legal standards.<sup>143</sup> Poor lawyering on the part of some state prosecutors<sup>144</sup> and Christian school attorneys<sup>145</sup> offers partial explanation for this judicial failure. Varying regulatory schemes are also at issue.<sup>146</sup> More significant, however, these cases often present courts with an apparently hopeless entanglement of fact, judgment, secular values, and religious conviction.

The primary failure of the courts has been the failure to make careful factual determinations.<sup>147</sup> To a large extent, the outcome of cases involving state regulation of Christian schools often hinge on whether the courts prefer unrestrained parental choice in education or state control over some of the essential components of Christian education. Even Supreme Court guidance may not ensure uniformity since these

140. See Devins, *supra* note 14; and Devins, *supra* note 52.

141. See Devins, *supra* note 14.

142. Compare *State v. Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976) with *State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 415 N.E.2d 279 (1980). According to William Ball:

The Ohio Supreme Court, the *Olin* case has now opened the door to extensive state regulation of religious schools. The Court, while agreeing that the state regulations held unconstitutional in *Whisner* were unreasonable, goes on to say, “We believe that such a set of less restrictive standards could, and should, be adopted.”

Memo from William Ball re: *State v. Olin* (Jan. 30, 1981).

143. See *infra* note 209-221, and Devins, *supra* note 73. It should be noted that there are slight variances in the statutes involved in these cases. But these variances do not explain the tremendous variations in court decisions on this matter.

144. See *Whisner*, 47 Ohio St.2d at 217-18, 351 N.E.2d at 771 (“In the face of the record before us, and in light of the expert testimony . . . it is difficult to imagine a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”) and *State v. Nobels*, S 791-0114-A (Allegan City, Mich.) slip op. at 8 (“No evidence has been introduced in this case that would demonstrate that the State has a compelling interest in applying teaching certification laws to the Nobels.”)

145. The Christian Law Association, which refuses to raise the entanglement issue, lost significant cases in Nebraska, North Dakota, and Massachusetts. *Faith Baptist*, 207 Neb. 802, 301 N.W.2d 571; *Shaver*, 294 N.W.2d 883; *Grace Bible*, *supra* note 73. The Christian Law Association’s technical victory in Ohio is generally considered a setback for the fundamentalist cause. *Olin*, 64 Ohio St.2d 341, 415 N.E.2d 279. The *Shaver* and *Olin* decisions both point to possible deficiencies in the trial record. In *Shaver*, the court claimed “No attempt was made at trial to show how compliance with the law would affect the religion of the parents or their children . . . . A perusal of the record fails to disclose a deeply rooted religious conviction against the use of certified teachers” 294 N.W.2d at 894. In *Olin*, William Ball commented: “Nor does the record show that there was any development whatever for the issue of compelling state interest. . . . Also it does not appear that discovery was employed.” Ball, *supra* note 142, at 2.

146. See *supra* note 67. These variances, not surprisingly, are relied upon by courts in distinguishing surfaceally inconsistent judicial holdings. See *Shaver*, 294 N.W.2d at 898, 899 (distinguishing *Whisner* and *Rudasill*), *Faith Baptist*, 207 Neb. at 814-15, 301 N.W.2d at 578-79 (distinguishing *Whisner* and *Rudasill*), *Bangor Baptist*, 549 F. Supp. at 1218 (distinguishing *Faith Baptist*) and *Olin*, 64 Ohio St.2d 353-54, 415 N.E.2d at 287-288 (distinguishing *Whisner* and *Shaver*).

147. This can be attributed in part to the failure of attorneys to develop factual records. See *supra* notes 144 & 145, and Weeks & Devins, *supra* note 103.



cases are easily distinguishable due to the incredible variety among challenged regulatory schemes.<sup>148</sup> Courts ultimately must apply a similar standard of review, however, to ensure consistent decisionmaking in this area.<sup>149</sup>

The current state of judicial decisionmaking in Christian school lawsuits is apparent in the varying judicial perceptions of teacher certification requirements. In *Kentucky State Board v. Rudasill*,<sup>150</sup> the Kentucky Supreme Court, in holding such teacher certification requirements unconstitutional, contended that

[i]t cannot be said as an absolute that a teacher in a nonpublic school . . . will be unable to instruct children to become intelligent citizens. . . . [T]he receipt of 'a bachelor's degree from a standard college or university' is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelligently exercise the elective franchise.<sup>151</sup>

The Ohio Supreme Court<sup>152</sup> and a Michigan trial court<sup>153</sup> have similarly held such certification requirements unconstitutional.

In stark contradiction to these decisions, the Nebraska Supreme Court upheld a teacher certification requirement in *State v. Faith Baptist Church*.<sup>154</sup> That court thought that

it cannot be fairly disputed that such a requirement is neither arbitrary not unreasonable[. A]dditionally, we believe it is also a reliable indicator of the probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.<sup>155</sup>

The North Dakota Supreme Court<sup>156</sup> and a North Carolina trial

148. See *supra* notes 67 & 146.

149. See Devins, *supra* note 14.

150. 589 S.W.2d 877 (Ky. 1979).

151. *Id.* at 884.

152. In *State v. Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976), the Ohio Supreme Court held unconstitutional a teacher certification requirement

In the face of the record before us, and in light of the expert testimony. [I]t is difficult to imagine a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. . . . We will not, therefore, attempt to conjure up such an interest in order to sustain application of the 'minimum standards' to these appellants.

*Id.* at 217-18, 351 N.E.2d at 771.

153. In *State v. Nobel*, 5-7-91-0114-A (Allegan City, Michigan), a Michigan trial court refused to enforce a state teacher certification requirement.

No evidence has been introduced in this case that would demonstrate that the state has a compelling interest in applying the teacher certification law to the Nobels or the educational interest of the State would not be achieved by a requirement less restrictive on the religious beliefs of the Nobels.

*Id.* at 8.

154. 207 Neb. 802, 301 N.W.2d 571 (1981).

155. *Id.* at 579.

156. In *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980), the North Dakota Supreme Court upheld a teacher certification law claiming that

courts are ill-equipped to act as school boards and determine the need for discrete aspects of a compulsory school education program. The Courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of edu-

court<sup>157</sup> have used similar reasoning in upholding their respective teacher certification regulations.

Commentators on this matter, not surprisingly, have assailed the holdings in each of these groups of cases.<sup>158</sup> These divergent views

cational quality. Although North Dakota's minimal requirement for state approval of a private or parochial school may be imperfect, without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being protected.

*Id.* at 899-900.

157. In *States v. Columbus Christian Academy*, No. 78 CVS 1678 (Wake County Super. Ct.), a North Carolina trial court held that

To insure that the child receives [essential] skills, it is necessary that he be given instruction on basic subjects by individuals who are qualified and competent to teach those subjects. The statutes and regulations which have been adopted to achieve this and are based upon sound educational policy and logic.

*Id.* at 14.

158. The *Whisner* decision was viewed with approval in Carper *supra* note 14 and with disapproval in Note, *Public Regulation of Private Religious Schools*, 37 OHIO ST. L. J. 899 (1976). The *Faith Baptist* case was viewed with approval in Comment, *State Regulation of Religious Education*, 15 CREIGHTON L. REV. 183 (1981) and with disapproval in Commentary, *Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 51 NEB. L. REV. 74 (1982). The *Rudasill* decision was viewed with disapproval in Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion vs. the State's Interest in Quality Education*, 67 KY. L. REV. 415 (1979-80) and in *Education and Religion*, 6 N. KY. L. REV. 125, 140-151 (1979).

Wendell Bird argued vigorously that courts should heed the legitimate free exercise claims raised by fundamentalists. In *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 1979 HARV. J. OF LAW AND PUB. POL. 125, 191 note 301, Mr. Bird assailed the Columbia Christian Academy rationale:

This holding in *Christian Academy* was erroneous. And it was based upon the erroneous assumption that religious instruction does not hinder or prevent locating theologically acceptable instructors. The court held that "Fundamentalist Christianity contains no specific prohibition against doing any of the things specifically required by the State's regulations," and in particular does not prohibit "the hiring of certified teachers, the presentation of instruction in certain basic subjects, the provision of textbooks or other instructional materials," or the other requirements. But the absence of specific injunctions in religious articles of faith does not prevent the occurrence of a burden on free exercise of these regulations. The court misstated the issues, because while religious beliefs did not prohibit the hiring of certified teachers, they did require the hiring of theologically acceptable teachers, which was burdened by the requirement of specified qualifications from accredited universities; while religious beliefs did not prohibit the presentation of basic instruction, they did govern many aspects of instruction to secondary school instruction and upper elementary instruction; and while religious convictions did not prohibit provision of textbooks, they did require use of texts that might not be substantially equivalent to public school texts. Finally, the holding was based upon the erroneous ruling that the state had a compelling interest that justified these intrusive regulations, because these regulations went well beyond basic educational courses in which the state possibly has a compelling interest.

Countering this position, Cynthia West claimed that the *Rudasill* court was misguided. [The] trial court found that "[c]ompliance with the various regulations . . . would be financially impossible for some of the church Plaintiffs." [T]he briefs do not support this finding, and there is no evidence as to whether regulations would impose such a burden. Furthermore, in *Braunfeld v. Brown*, the Supreme Court . . . stated that

"it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment."

If educational studies or philosophies conflict in this critical area, and no better method of assuring that teachers are competent can be suggested, the logic of requir-

among courts and commentators, more than anything else, point to the need for a definitive standard of review on this matter. A definitive standard of review could follow one of two conflicting modes of analysis: judicial deference to academic judgments made by state education decisionmakers,<sup>159</sup> or a requirement that "clear and convincing proof" must be introduced by the state to justify an infringement on the fundamental religious liberty right.<sup>160</sup>

### Clear and Convincing Proof Standard

The current trend of conflicting court decisionmaking on this matter is not likely to change course. There is a sensible standard of review, however, which should be uniformly applied:

If there is an infringement on a sincerely held religious belief, the state—in order to demonstrate that this infringement is the least restrictive means to further some compelling state interest—must meet the evidentiary standard of proof of clear and convincing evidence. The general standard of civil litigation of preponderance of the evidence is unsatisfactory in light of the preferential position of religious freedom and its social impact.<sup>161</sup>

Under this standard, freedom of religion merits the same protection as freedom of speech.<sup>162</sup> Consequently, courts could justify their willingness to be less deferential in their review of state and local education decisionmaking—a matter that courts generally prefer to stay out of<sup>163</sup>—under the Supreme Court's *Tinker*<sup>164</sup> doctrine.

In *Tinker v. Des Moines Independent Community School Dist.*,<sup>165</sup> the Court upheld the First Amendment right of public school students to wear black arm bands to school in protest of the Vietnam War. In so holding, the Court required that the school must affirmatively establish that the wearing of these armbands would be disruptive to the educa-

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ing teachers to acquire some reasonable level of higher education should override the speculative fears of the schools that they will be unable to fund certifiable teachers of their religious faith.

Note, *supra* note 69, at 825 n.136, 826.

159. See *infra* notes 175 & 176.

160. See *infra* notes 161 to 174.

161. Devins, *supra* note 14 (adopted from Boothby, *supra* note 14 at 613).

162. "The burden of proof must rest on government to justify any restraint on free expression prior to its judicial review and on government to demonstrate the particular facts necessary to sustain a limitation on suppressive behavior." L. TRIBE, *supra* note 116 at 7-34. The Supreme Court articulated the "clear and convincing" proof standard for free expression cases in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1956):

There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest in a transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof. . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt.

The application of the "clear and convincing" proof standard in individual liberty cases is discussed in Boothby, *supra* note 14 at 620-24.

163. See *infra* note 176.

164. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

165. 393 U.S. 503 (1969).

tional process. The Court claimed that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate."<sup>166</sup> Similarly, in fundamentalist Christian lawsuits, the state ought to demonstrate that students in fundamentalist schools are not learning as much as their public school counterparts.<sup>167</sup>

Religious freedom is a preferred constitutional protection against which "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."<sup>168</sup> Consequently, it is generally recognized that

[i]t is not enough . . . for a state to show that its interest in an educated citizenry override religious group's general opposition to state regulatory authority over sectarian schools. The state must also justify its interest in each specific regulation or standard imposed under this authority that infringes upon free exercise.<sup>169</sup>

Although the Supreme Court has recognized the need for narrowly drawn legislation when religious liberty interests are at stake<sup>170</sup> and the central role of religious liberty in a democratic state,<sup>171</sup> it "has never specified the particular standard of proof constitutionally required before the state can deprive an individual of [religious liberty] interests."<sup>172</sup>

Professor Gianelli has argued that "[a] thoroughgoing balancing test would measure three elements of the competing government interest: first, the importance of the secular value underlying the government regulation; second, the degree of proximity and necessarily that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption for religious reasons would have on the overall regulatory program."<sup>173</sup> Yet even this precise standard of review is without meaning, unless the courts require the state to present "clear and convincing" proof as to the centrality and relative unobtrusiveness of the existing regulatory scheme.<sup>174</sup> Such a requirement would be in accord with the current standard of review in equal protection and free speech lawsuits.

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166. *Id.* at 506.

167. See Murren *supra* note 17 at 8.

168. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

169. Note, *supra* note 69, at 813.

170. See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("the power to regulate [religious conduct] must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms.")

171. See *Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970) (Brennan J., concurring) ("[religious freedom] contribute to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society").

172. Boothby, *supra* note 14 at 618.

173. Gianelli, *Religious Liberty, Establishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967). A discussion of both the constitutional standard applied in free exercise cases and the adequacy of that standard can be found *supra* notes 170-172.

174. See *supra* note 104; and Clark, *supra* note 116.

### Inapplicability of Judicial Abstention Doctrine

Courts generally are reluctant to intervene in matters of education policy on the basis of deference to the expertise of education decisionmakers and deference to the political process, which supposedly serve as adequate independent checks on state and local education officials.<sup>175</sup> Neither academic decisionmaking nor local control, however, serve as adequate protection against abuses of religious liberty guarantees.

The Supreme Court has recognized that "by and large, 'public education in our nation is committed to the control of state and local authorities,' and the federal courts should not ordinarily 'intervene in the resolution of conflict which arise in the daily operation of school systems.'" <sup>176</sup> Recently, Chief Justice Burger again espoused the virtues of local control of public education in *Island Trees Union School District v. Pico*.<sup>177</sup>

This theory of local control, however, is inapplicable to Christian day schools.

First, the logic of local control hinges on the assumption that individual choice will be fairly expressed through the political process. Yet the *raison d'être* for Christian day schools is a dissatisfaction on the part of the fundamentalists with the current structure of public education. Hence, it would be absurd for a court to say that these minority viewpoints must seek protection in the political process.

Second, the local control rationale ignores the transcendent constitutional rights at stake. In *Epperson v. Arkansas*,<sup>178</sup> for example, the Court noted that it is the duty of federal courts "to apply the First Amendment's mandate in our educational system where essential to

175. Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 HARV. L. REV., 1106 (1981).

176. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

177. 102 S. Ct. 2799 (1982). The Chief Justice stated in dissent in *Pico*:

Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.

*Id.* at 2820-21 (Burger, C.J., dissenting). In a similar vein, Justice Powell contended in *Pico* that "[i]t is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board." *Id.* at 2822 (Powell, J., dissenting).

This notion that the constitutional rights of students and their families are adequately protected through the political process was adopted by a majority of the Court in *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Ingraham*, the Court upheld the constitutionality of corporal punishment over due process and cruel and unusual punishment claims. For the Court:

The openness of the public school and its supervision by the community afforded significant safeguards against [abuse]. . . . As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints [of tort law] will not effectively remedy and deter excesses.

*Id.* at 670. See Note, *supra* note 175, at 1112-16.

178. 393 U.S. 624 (1968).

safeguard the fundamental values of freedom of speech and of inquiry."<sup>179</sup> The Court similarly held in *West Virginia v. Barnette*<sup>180</sup> the Boards of Education have no functions "that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual."<sup>181</sup> If religious liberty is thus viewed as being central to the constitutional scheme, judicial deference to state education policies should not be based on the political process.

Courts, for the most part, also are unwilling to intervene in education policy determinations.<sup>182</sup> The rationale behind this standard of review was stated in *Tedeschi v. Wagner College*:<sup>183</sup>

[M]atters involving academic standards generally rest upon the subjective judgment of professional educators, (thus) courts are reluctant to impose the strictures of traditional legal rules. Though such matters are subject to judicial scrutiny, the issue reviewed in such a case is whether the institution has acted in good faith.<sup>184</sup>

The Supreme Court has also expressed support for the judgments of professionals.<sup>185</sup> In *Youngberg v. Romeo*,<sup>186</sup> Justice Powell accorded a "presumptive correctness" to the decisions of professional personnel by virtue of their "demonstrated" competence through education, training, or experience.<sup>187</sup> In *Board of Curators of University of Missouri v. Horowitz*<sup>188</sup> the Court went so far as to hold that the constitutional procedural due process protections were afforded to a student dismissed on academic grounds simply because the dismissal was made by professional educators.<sup>189</sup>

Regardless of whether deference to academic expertise is sound judicial policy,<sup>190</sup> such deference is constitutionally impermissible if fundamental right exercises are at stake. As stated in *Barnette*,

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179. *Id.* at 104.

180. 319 U.S. 614 (1943).

181. *Id.* at 637.

182. See Devins, *Plagiarism at Princeton: An Academic Judgment or a Disciplinary Procedure*, LEX COLLEGIUM, Winter, 1983.

183. 49 N.Y.2d 652, 404 N.E.2d 1302 (1980).

184. *Id.* at 658, 404 N.E.2d at 1304.

185. See Rosenblum, *High Courts Support for Professionalism in Education*, EDUC. WEEK, Oct. 6, 192, at 24.

186. 102 S. Ct. 2452 (1982).

187. *Id.* at 2461-62.

188. 435 U.S. 78 (1978).

189. See Note, *supra* note 175, at 1116-19. In *Horowitz*, the Court concluded that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the tools of indirect administrative decisionmaking." 435 U.S. at 90.

190. Judge Bazelon observed that:

diffidence in the face of [academic] expertise is conduct unbecoming a court. Very few judges are [educational experts]. But equally few are economists, aeronautic engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject similar scrutiny of [academic matters].

Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743-44 (1969). [as adapted in Dessem, *Academic Versus Judicial Expertise*, 39 OHIO ST. L.J. 476-481 (1978).

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts.<sup>191</sup>

Thus judicial deference to academic decisionmaking or local control is inappropriate when fundamental rights are at stake.<sup>192</sup> Quite simply, "First Amendment rights are entitled to special constitutional solicitude."<sup>193</sup> This "special constitutional solicitude" should be reflected through a requirement that the state produce "clear and convincing proof" that any state-imposed infringement on religious liberty satisfy the least restrictive means-compelling interest requirement.

### CONCLUSION

The conflict between Christian educators and the state is not likely to end.<sup>194</sup> Yet, the courts can assist in the resolution of this conflict by adopting a standard of review that will lead to predictable results in this type of case. The contention made in this article is that courts should require the state to introduce "clear and convincing proof" that its regulatory scheme is the least restrictive means available to effectuate some compelling state interest.<sup>195</sup> The importance of religious freedom in American life justifies the adoption of this standard. Finally, judicial deference to either academic decisionmaking or the political process are inadequate checks against state imposed interferences with religious liberty freedoms.<sup>196</sup>

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191. 319 U.S. at 639.

192. See *supra* notes 244 to 247 and accompanying text.

193. *Widmar v. Vincent*, 454 U.S. 263 (1981).

194. See *supra* notes 8-10 and Devins, *supra* note 4.

195. See *supra* notes 161-74 and accompanying text.

196. See *supra* notes 175-91 and accompanying text.