B. STATE REGULATION OF RELIGIOUS SCHOOLING

As public school systems have developed in this country over the past century and a half, there has evolved a philosophy and praxis around them that has moved far beyond the minimalist beginnings of the charity schools and dame schools of the country's early efforts in nonelitist education. Colleges of teacher education have developed in almost every state, and national organizations of professional educators have grown in strength and influence, such as the National Education Association, the American Association of School Administrators, the American Federation of Teachers, and the National Council of Chief State School Officers. These organizations have formed what might be called the Education Establishment, and they have been instrumental in securing legislation setting up comprehensive public systems of education in all states presided over by state departments of education that embody and imbue the prevailing orthodoxies of John Dewey or B.F. Skinner or whomever.

Most state departments of education view themselves as responsible for all the education of all the children in the state, including those in nonpublic schools, and they have been indulged in this conception by state laws that give them some degree of regulatory power over nonpublic education. Expanding upon this responsibility, some state departments of education have evolved a vast corpus of detailed regulations for the governance of nonpublic schools, some of which regulations are unclear, incoherent, open-ended or mutually contradictory, and often envision (and purport to require) perfections of performance not remotely attained in the *public* schools for which the state has more immediate responsibility. In addition, some of the regulations stipulate goals, practices or conditions that are antithetical to the religious convictions of some of the church-related nonpublic schools. This has led to resistance to state regulation on the part of a number of Christian day schools, which has resulted in a rash of litigation.

1. Early Court Decisions on Private Schooling

Several states made efforts following the first World War to curtail the activities of private schools or even to eliminate them altogether. These draconian measures were halted by the U.S. Supreme Court in two historic decisions.

a. *Meyer v. Nebraska* (1923). As a result of war-induced xenophobia, several states of the Midwest prohibited the teaching of foreign languages. Nebraska made it a crime for teachers in private schools to teach in a language other than English or to teach a foreign tongue to children below the ninth grade. Teachers in certain Lutheran

and Reformed parochial schools were convicted of teaching children in German through the use of Bible stories in that language.

The U.S. Supreme Court reversed their conviction, holding that the state might not attempt to advance the otherwise laudable goal of promoting a homogeneous people with American ideals by forbidding the lawful conduct of teaching a foreign language, since that would violate the Fourteenth Amendment's ban on any state's depriving its citizens of "life, liberty or property without due process of law." The "liberty" so guaranteed included:

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[1]

The Nebraska statute violated the liberty thus defined because it deprived teachers of the liberty to teach and parents of the liberty to employ teachers to instruct their children. Although this case arose from the teaching of Bible stories in parochial schools, it did not pertain specifically to religious instruction.

b. *Pierce v. Society of Sisters* (1925). Two years later the Supreme Court reached an even broader concept of freedom for private schools in a case originating in Oregon, which had passed a law requiring all able-bodied and teachable children to attend public schools *only*. That law was challenged by the Hill Military Academy and a parochial school operated by the Roman Catholic Society of the Sisters of the Holy Name of Jesus and Mary, which contended that they were being put out of business without the "due process of law" guaranteed against state action by the Fourteenth Amendment.

The Supreme Court of the United States struck down the Oregon law in a decision that has been called the Magna Carta of parental rights in education. The court first noted that the states have certain powers and responsibilities with respect to nonpublic education that were not being challenged:

> 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 be taught, and that nothing be taught which is manifestly inimical to the public welfare.[2]

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1. *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also *Farrington v. Tokushige*, 273 U.S. 284 (1927), similarly striking down a statute in the Territory of Hawaii designed to regulate Japanese-language schools. (As in *Meyer*, no religious issue was involved.)

2. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

But the present act would destroy all "private primary schools for normal children" in the state, although they were "engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious," and no "peculiar circumstances or present emergencies" were cited by the state to justify such "extraordinary measures relative to primary education."

Citing the doctrine of *Meyer v. Nebraska, supra,* the court held:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. *The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations*.[3]

This passage is one of the memorable assertions of the basic meaning of liberty and resonates to the fundamental convictions of most devotees of freedom, who may not previously have considered or articulated such a thought but can recognize in it immediately an essential condition of the kind of life they would want to insure for themselves and for all. (The only improvement one might have wished for that language was in the phrase "power of the state to standardize *its* children"; it would have been better to have said, "the children living within its borders," but the next sentence made clear that children are not the property of the state.)

This decision was not based on the Free Exercise Clause or on any other part of the First Amendment, but on the Due Process Clause of the Fourteenth, and seemingly more on the protection of *property* than of *liberty* in that clause, since the plaintiffs were corporations, which could not as clearly claim the liberty that their present and prospective clients might. But the court held that they had property interests that were equally protected by the Due Process Clause, and so struck down the law that would have impaired or destroyed their "business." However, the Supreme Court in subsequent decisions has attributed a First Amendment force to *Pierce*.[4]

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3. Ibid., emphasis added.

4. "In *Griswold v. Connecticut* [381 U.S. 479, 482-3 (1965)], the Supreme Court spoke of *Pierce* as resting on the first amendment. Later, in *Wisconsin v. Yoder* [406 U.S. 205, 233 (1972)], the Court referred to *Pierce* as `a charter of the rights of parents to direct the religious upbringing of their children.' A still later decision mentioned `the right to choose nonpublic over public education,' in *Pierce* as an aspect of free exercise [*PEARL v. Nyquist*, 413 U.S. 756, 788 (1973)]." Esbeck, Carl H., "State Regulation of Social Welfare Ministries of Religious Organizations," *Valp. Univ. L. Rev.* 16:1 (1981), p. 52.

The decision does not apply to religious schools only but to *all* nonpublic education that meets the description in the first paragraph quoted above. It could hardly be otherwise, since one of the plaintiff schools was a nonreligious military academy. As Laurence Tribe has observed, rights and liberties enjoyed by religion are often most strongly vindicated when done on a basis that is broad enough to include other similar rights and liberties as well.[5]

2. *Wisconsin v. Yoder* (1972)

Almost half a century intervened between *Pierce* and the next Supreme Court decision dealing with state regulation of religious education, but *Wisconsin v. Yoder* follows directly upon the logic of *Pierce*, refers to it extensively and with approval, and distinguishes the only intervening, tangentially pertinent case, the "child-labor" decision in *Prince v. Massachusetts*.[6] *Wisconsin v. Yoder* represents what may be viewed in retrospect as the high-water mark for the judicial protection of the free exercise of religion in this country, since it has been rather generally criticized in the legal literature, even by friends of religious freedom, and the Court has seemed reluctant since 1975 to entrench or expand the territory claimed by *Yoder* for Free Exercise. Some courts have even viewed it as an Amish-only case, despite a similar insularity sought by some Hasidic groups.[7]

This monumental case arose when three farmers in Wisconsin were convicted of "truancy" under the compulsory education laws for not sending their children to public high schools through age sixteen. The three fathers, Jonas Yoder, Wallace Miller, and Adin Yutzy, offered as their only defense that they were members of the Old Order Amish religion and that sending their children to public high school was contrary to their religion. Since defending themselves in court was also contrary to their religion, the Amish men would have paid their (minimal) fines, continued to refuse to obey the objectionable law, been punished again, and so on *ad infinitum* until they moved to Canada or somewhere to find greater freedom for their faith, as many Amish have before them.

But their defense was undertaken by the National Committee for Amish Religious Freedom, organized by a Lutheran pastor, the Rev. William Lindholm, and including many advocates of religious liberty (among them this author), and the services of one of the great defenders of religious freedom in this century, William Bentley Ball, were secured. He marshalled a masterful array of evidence at trial, which—though unsuccessful in averting a conviction—turned the tide at the appellate level and laid

5. Tribe, L., "Church and State in the Constitution," in Kelley, D.M., ed., *Government Intervention in Religious Affairs* (New York: Pilgrim Press, 1982), pp. 34-35. This principle may have been elevated to constitutional status in *Texas Monthly v. Bullock*, 481 U.S. 1 (1989), discussed at VC6b(4).

6. 321 U.S. 158 (1944), discussed at IIA2l.

7. See *Kiryas Joel v. Grumet*, (1994), discussed at § D7o below.

the foundation for one of the landmark decisions of the nation's highest court. The Wisconsin Circuit Court affirmed the conviction, but the state Supreme Court reversed on the strength of the Free Exercise defense, and the state appealed to the U.S. Supreme Court, which affirmed the court below by a score of Amish 6, Wisconsin 1 (justices).

a. The Old Order Amish. One reason this case is not appreciated in some quarters may be because of a lack of understanding of the Amish. To many people they are at best an antiquarian curiosity to be viewed by sightseers in the Pennsylvania Dutch country (and elsewhere) as quaint relics of a bygone era, trundling along in their primitive horse-drawn carriages, wearing their flat-brimmed black hats and somber sunbonnets; and a few people seem to consider them an intolerable obstacle to modern progress, if we can judge by efforts of hot-rodders to run them off the road and by a vicious attack in which an Amish baby was killed by a heavy stone thrown into a buggy from a passing pickup truck. But they are not just a dwindling vestige of a vanishing agrarian culture; they are a vigorous, though fragile, subculture based on a pervasive religious ethos. If extensive efforts can be made by environmentalists to preserve endangered species like the obscure snail-darter, it should be possible to preserve and protect precious human subcultures, even those with fewer distinctive features than the Amish.

They are the most "faithful" (in the sense of least acculturated) descendants of the Anabaptist movement referred to earlier. They derive from the leading of Jakob Ammann, who in 1693 worked among the Dutch Mennonites to achieve a return to stricter Anabaptist faith and practice. At the center of the Amish group today are the Old Order Amish, the most rigidly traditionalist of all the Anabaptist descendants. The less-strict groups have relaxed the original ideals of the Anabaptist movement in various adjustments to "the world," but they can afford that luxury as long as the Old Order persists at the center of the fountain to keep the faith pure, and refreshes with its example and its emigrants the more assimilated groups that surround it like a series of settling basins. Thus the Old Order is the source and standard that keeps the whole Amish-Mennonite movement in touch with its Anabaptist origins.

The Anabaptists eschewed for themselves all pomp, power, wealth, prestige, ostentation and sophistication. They sought instead a humble and unpretentious way of life, if possible close to the land. They undertook to care for one another in life's vicissitudes, so that no member of the congregation should suffer want. Each congregation formed a self-governing band that sought to keep itself "unspotted from the world." Their sole authority was the Holy Scripture, as interpreted and applied by each congregation, in which every member had a full and equal voice. In order to be able to take part in the deliberations of the congregation, each member had to know how to read the Scripture. Thus the Anabaptist movement was one of the first organizations to require a standard level of literacy among all its members, and to institute methods of instruction to achieve it.

When new problems arose, the congregation discussed them in the light of Scripture and tradition until a consensus was reached—a form of "participatory democracy" developed at a time when there was no democracy in church or state. After a consensus had been reached, no one was entitled to depart from it without suffering the "ban" (*Meidung*)—ostracism from the congregation. These practices are still observed among the Amish.

Thus the Anabaptists initiated or first gave practical effect to several important elements in Western civilization: (1) rejection of civil coercion in religious matters, (2) separation of church and state, (3) common universal education, and (4) self-government by mutual persuasion within a community of equals. They have also embodied several ideals that Western civilization has not yet accepted but some day may—if the model is not lost: (5) nonviolence, "defenselessness," (6) "plain living," (7) mutual aid, and (8) "living loose from the world."

It is ironic that the state of Wisconsin should undertake to define the duty of the Amish in education when the Amish since 1693, and the Mennonites since 1536, have been painstakingly educating every child in their gathered community. This they did long before the secular state made any effort to educate everyone and centuries before there was a state of Wisconsin. But Amish education is devoted to preparation for a way of life different from that which dominates twentieth-century American life.[8]

The objection of the stricter[9] Amish groups to public secondary education has three elements. (1) They believe all children should be educated for what they consider the good life—farming or farm-related occupations, with a minimum of modern science or technology. The number of years of school is not as important to them as the content of education. Since formal education tends toward acculturation, they seek to minimize the time their children are exposed to this hazard. (2) The center of their anxiety is really the consolidated high school in the "wicked city." To avoid this peril, they resist transportation of their children by bus into town, even in the lower grades and even when promised homogeneous Amish classes in town. It is the town itself that infects the child with worldly influences far from the protective aura of the family and faith group. (3) The Amish would be able to educate their

8. See Littell, F.H., "Sectarian Protestantism and the Pursuit of Wisdom," in Erickson, Donald A., ed., *Public Control of Non-Public Education* (Chicago: Univ. of Chicago Press, 1969), p. 65, citing "Education, Mennonite" and "Education Among the Mennonites in Russia," in *Mennonite Encyclopedia* (Scottdale, Pa.: Mennonite Pub. House, 1956), vol. II, pp. 150-157.

9. The point is sometimes made that some Amish groups do not object to public high-schooling for their children, as though that invalidated the objections of others. Each Amish congregation determines such decisions for its members, and it is usually the more conservative congregations, trying to preserve the "purer" form of their faith and practice, that reject public secondary education and the more assimilated Amish groups that accept it, thus hastening their assimilation. The Supreme Court has recognized that differences in doctrine within religious bodies do not invalidate any of them for protection by the Religion Clause of the First Amendment. *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at IVA5l.

children entirely in their own private schools with teachers of their own faith if it were not for the state's certification requirement, since members are not supposed to have more than eight years of (formal) education themselves.[10]

The Amish are more concerned about the character of the teacher than about the content of the curriculum. If the teacher is a good man or woman, the product of years of "apprenticeship" in the Amish understanding of life, he or she can be trusted to transmit—and, more important, to *embody*—what it is really needful for Amish children to know. The non-Amish teacher has not undergone this essential training and so—whatever his or her academic attainments—cannot be relied upon to deliver genuine "education" as the Amish understand it.

Lastly, Amish education is not dependent upon the relatively artificial, abstract and sequestered methods of public schooling. It is not confined to four walls or to a few hours of the day. It goes on all day long, wherever the child is in the close-knit Amish community. Because the Amish community as an integral whole is the assiduous educator of the Amish children, from childhood through adulthood, it is understandable that the Amish should object to the extraction of their children from that nurturing medium and their transportation to the artificial enclosures of public school classrooms. To them, the secondary *schooling* required by the state is not only time lost from genuine *education*, but it is, by its very nature and in the respects recited, positively pernicious. The state of Wisconsin, throughout its brief, continually assumed that education takes place only in "schools." It would be risky in respect to most persons and groups for the state to assume that they will acquire an education without certain required schooling. But in certain exceptional instances, such as that of the Amish, the state should be prepared to follow the folk-adage, "Don't let schoolwork interfere with your education."

It is hard enough to maintain a nonconforming religious community against the diffuse contrary influences of secular culture without the state compelling acculturation *by law*. The requirements of the state of Wisconsin would have the unavoidable effect of making the Amish community something other than it is and wants to be. The required certification of teachers in parochial schools meant that those teachers must be products of the very literary-scientific-technological culture the Amish consider demonic. Since no Amish teachers could remain true to the faith of the strict congregations and at the same time qualify for state certification—as state law required—the consequence was that the Amish could not permit their children to attend even parochial secondary schools without subjecting them to "alien" teachers and thereby jeopardizing their attachment to the Amish way of life and their eternal salvation.

The dialectic begun with the classic case of *Pierce v. Society of Sisters* continued with the arguments in the Amish case. In *Pierce*, the state of Oregon attempted to

10. Kelley, D.M., "Is There Room for the Amish?" in *Town and Country Church*, May-June, 1966, pp. 7 ff., a publication of the National Council of Churches, New York, N.Y.

compel all children to attend public schools, but the Supreme Court ruled that nonpublic schools had a right to exist. Now the state of Wisconsin was insisting that *all* schools must be *like* public schools in their basic curriculum, duration, teachers' qualifications and architecture. Was that not simply another level of the question answered by the court in *Pierce*? Was not the attempt by the state to standardize its *schools* tantamount in effect to an effort to "standardize its children by forcing them to accept instruction from public teachers only" or from teachers indistinguishable from public teachers?

The anxiety that if an exception was made for the Amish, the whole system of public education would break down is fallacious. The Amish *are* an exception. The compulsory education law need not apply to them nor to any other religious community that for generations has not produced juvenile delinquents, felons, or public dependents, and takes care of its own members, educating them effectively to assume the roles they will follow in adult life.[11]

b. The Court's Opinion. The opinion of the court was delivered by Chief Justice Warren Burger. He noted that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."[12] Thus was homage paid to the general rule underlying this entire section, to which the instant case was an exception.

> Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system.... As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations...." Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right with an equally firm, even if less explicit, prohibition against the establishment of any religion by government.

Then came one of the key affirmations of recent church-state jurisprudence, frequently quoted in subsequent lower-court decisions:

> *The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance*

11. Brief *Amicus Curiae*, National Council of Churches, in *Wisconsin v. Yoder, passim*.
12. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

> *legitimate claims to the free exercise of religion*. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

The court examined the validity of the Amish claims, to determine their religiousness, their sincerity, and whether the state's compulsory school attendance statute really interfered with them. The court made clear that nonreligious claims would not succeed.

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.... [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

On the basis of the trial record, however, the court readily concluded that the Amish met the tests of religiousness and sincerity.

> [T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world...." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.
>
> The record shows that the [Amish] religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. [They] freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit

> difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society....

The court appeared to satisfy its concern with sincerity, implicitly if not explicitly, largely on the basis of *perdurance*. That is, since the Amish have been cultural holdouts for so long, they must be sincere. The next question was whether the state's requirements threatened the sincere religious practices of the Amish.

> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society *exerting a hydraulic insistence on conformity to majoritarian standards*. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the wordly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion.... The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.
>
> The impact of the compulsory-attendance law on [their] practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.... As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

c. The State's Claims. The court examined the claims of the state of Wisconsin to determine if it had asserted a state interest sufficient to justify the interference with the religious rights of the Amish. The state had not contested the religious nature and basis of the Amish claims, nor their sincerity, but put its entire emphasis

on the contention that they must yield to the state's interest in universal compulsory formal secondary education to age sixteen. The state prefaced its argument, as states often do, with the venerable belief-action dichotomy dating back to *Reynolds v. U.S.* (but corrected in *Cantwell v. Connecticut*),[13] conceding that religious *beliefs* are absolutely free from the state's control, but that "*actions*"—even though religiously grounded—are outside the protection of the First Amendment, and therefore presumably fair game for whatever regulation the state wishes to impose, so long as it is reasonably in furtherance of a legitimate interest of the state. But the court corrected that view (notwithstanding which correction, states continue to assert it like a litany for whatever regulation they wish to justify). The court said:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the states in the exercise of their undoubted power to promote the health, safety and general welfare, or the Federal Government in the exercise of its delegated powers. But... there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.... A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

The state had taken the stance of Horatio at the bridge defending the entire system of compulsory universal education against the onslaughts of ignorance, but the court was not persuaded. Earlier it had noted that "[t]he Amish do not object to elementary education through the first eight grades... because they agree that their children must have basic skills in the `Three R's' in order to read the Bible, to be good farmers, and to be able to deal with non-Amish people when necessary...." So the dispute was only over the ninth and tenth years of formal schooling, and the court thought that a much less crucial matter.

> The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.
>
> However, the evidence adduced by the Amish in this case is persuasive to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.... [E]xperts testified at trial, without challenge, that the value of all education must be

13. 310 U.S. 296 (1940), discussed at IIA2c.

> assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.
>
> The State attacks [the Amish] position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record.... [T]he Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society: they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing the exemption of such groups as the Amish from the obligation to pay social security taxes.
>
> It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period of religious development....
>
> We must not forget that in the Middle Ages important values of the civilization of Western World were preserved by members of religious orders who isolated themselves from all wordly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic [eccentric?] but interferes with no rights or interests of others is not to be condemned because it is different.

The court wrestled with the most difficult question in the case (and the one that produced the sole dissent): does this policy on the part of the parents not keep the children in perpetual captivity to the cloistered religious community? Is the state not abetting this dependency if it does not insist that the children acquire some acquaintance with the rest of the world and some skills that would enable them to make their way there? The court responded that "on this record, that argument is highly speculative." In fact, the court thought that the Amish might even have some qualities that would be of value outside the agrarian community.

> There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problems that might exist.

The state had contended, on the strength of *Prince v. Massachusetts*,[14] that as *parens patriae* it had the responsibility of assuring a secondary education to the children even if the parents did not want it for them. (In *Prince* the court had upheld the conviction of a Jehovah's Witness adult for violating the child-labor laws by taking her young ward with her to sell tracts on the street.) The court observed that the sweep of the state's power to regulate religious activity in *Prince* had been reduced in *Sherbert v. Verner*,[15] to apply to "conduct or actions" that "posed some substantial threat to public safety, peace or order."

> This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred....
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> * * *
>
> Indeed, it seems clear that if the State is empowered, as *parens patriae*, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the state will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.... This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[16]

The court quoted the celebrated statement from *Pierce v. Society of Sisters*[17] and added: "[T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children." But just to make sure that no one should get carried away with the idea that the compulsory education laws might not apply to everyone, the court made clear that its holding with respect to the Amish was quite narrow:

> It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.
>
> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a

14. 321 U.S. 158 (1944), discussed at IIA2l above.
15. 374 U.S. 398 (1963), discussed at IVA7c.
16. *Yoder*, *supra.*
17. See italicized quotation at § 1b above.

> statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal education in terms of precisely those overall interests that the State advances in support of its compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent upon the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.[18]

Justices Lewis Powell and William Rehnquist had come on the court since the case was argued and so took no part in its decision. Justice Potter Stewart filed a brief concurrence in which Justice William Brennan joined, and Justice Byron White filed a concurrence in which Brennan and Stewart joined. Justice William Douglas dissented in part.

d. The Douglas Dissent. Justice Douglas thought the Amish children should have some say in the matter.

> If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.... And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the state may well be able to override the parents' religiously motivated objections....
>
> Frieda Yoder has in fact testified that her own religious views are opposed to high school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller....
>
> * * *
>
> These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again....[19] On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of this child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.
>
> It is the future of the student, not the future of the parents, that is imperiled by today's decision.[20]

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18. *Wisconsin v. Yoder, supra.*

19. Citing *Haley v. Ohio, In re Gault, In re Winship, Tinker v. Des Moines* (discussed at § E1 below) and *West Virginia v. Barnette* (discussed at IVA6b).

20. *Wisconsin v. Yoder, supra,* Douglas dissent.

The majority had disposed of that issue by pointing out that "[t]he children are not parties to this litigation. The State has at no point tried this case on the theory that [the parents] were preventing their children from attending school against their express desires..., [but] that it is empowered to apply its... law... without regard to the wishes of the child. That is the claim we reject today." If and when a case arose on the former theory, the court might find itself having to deal with it, but—until then—"we neither reach nor decide those issues."[21]

Justice Douglas had a few other comments about the majority's logic.

> I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test....

He welcomed the court's recognition of First Amendment protection of *action* as well as belief and entertained the hope that on this question *Reynolds v. U.S.* might some day be overruled. He was distressed, however, by the put-down of Thoreau's beliefs and actions as "philosophical and personal rather than religious" and thus not rising to the demands of the Religion Clauses, and he recalled that the court had fashioned a broader definition of "religion" in *U.S. v. Seeger*, where, with reference to the phrase "religious training and belief" in the Selective Service act, the court had said:

> Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others....[22]

Justice Douglas concluded:

> I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race.[23]

Thus the "score" was actually Amish 6 1/3, Wisconsin 2/3.

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21. Ibid., majority opinion.
22. *U.S. v. Seeger*, 380 U.S. 163 (1965), discussed at IVA5h.
23. *Wisconsin v. Yoder, supra,* Douglas dissent.

e. Some Critics of *Yoder*. Several commentators have felt that *Wisconsin v. Yoder* was something less than the finest product of the Supreme Court. Even Laurence Tribe, one of the leading legal champions of religious liberty, was not enthusiastic about it:

> The Court... said, in effect, that since children do not learn very much after the eighth grade anyway, the state has no compelling interest in requiring further schooling of the Old Order Amish, whom the Court plainly considered an exemplary group (the Court observed that they don't believe in welfare and have a low crime rate), and who have an old, established religion going for them. Now that kind of position seems insensitive to the need to show that what is really at stake is a genuine equality [of treatment of religious groups], appearing instead to go out of its way to single out a particular group for perhaps patronizing praise. It seems to say, "This group is fine; they meet our standard; they deserve this Court's Good Housekeeping Seal of Approval." When the Court takes such a position, it does little to advance the cause of religious freedom for all.[24]

Of course, Professor Tribe was being a bit facetious in the first sentence quoted, since the court did not say that children do not learn much after the eighth grade. As we have seen, it said that (only) *two additional years of formal, consolidated public high school experience* would not contribute a great deal to remedying the supposed deficiencies of Amish education, but could do great harm to the values and homogeneity of the Amish community, which is a very different statement.

Another commentator, at a conference on religious liberty, observed orally with some acerbity, "There is in the United States no established church—*except the Amish*, who are the only group exempted *because of their religion* from the *criminal* penalties of a statute of general application."[25] People who take umbrage at the court's making an "exception" of the Amish do not seem to understand—or be willing to credit—that the Amish *are* exceptional—in the ways enumerated—and are thus deserving of unique treatment commensurate with, and pertinent to, their differentness. They do not need the kind of clumsy and imperfect classroom instruction imposed on them as a substitute for one-on-one learning-by-doing that is the ideal form of socialization and education because *they already have it*! It is the height of arrogance for the modern state to try to impose on them the Procrustean bed of modern technical schooling—which is so uneven in its own achievements—when they have something much better, at least for the limited needs they have for tutelage during childhood and adolescence.

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24. Tribe, L., "Church and State in the Constitution," *supra*.

25. February 1985. Because of the ground rules of that gathering, no attribution of this remark is permitted, but the quoted statement was typical of one point of view about *Wisconsin v. Yoder*, a view that seems to have come to dominate the Supreme Court with *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e, although *Yoder* itself was not overruled.

Yet this is precisely the kind of mindless arrogance that seems sometimes to be typical of some modern "liberals" and "civil libertarians." Exhibits A and B of this propensity were expressed by two members of the Minnesota Civil Liberties Union following an address presented to the annual banquet of that organization by the present writer. The first, an attorney who had been a member of the National Board of the American Civil Liberties Union at the same time as this writer (1966 to 1969), arose and announced that he believed that *Pierce v. Society of Sisters* had been wrongly decided; that parochial schools should *not* be allowed to exist. The speaker was still trying to absorb that remarkable insight when another doughty civil libertarian arose to add that in his estimation *Wisconsin v. Yoder*, too, had been wrongly decided; *all* children should be required to attend *public* schools—"to rub elbows with one another" in order to "wear off the rough edges."

It appears that at least some supposed civil libertarians have a very different vision of what "liberty" is, what the "free" society should be and what "religious freedom" in particular means. One can think of no better illustration than these two comments of what the court may have been referring to when it spoke of "hydraulic insistence on conformity to majoritarian standards." Some of us would infinitely prefer to live in a society shaped by *Pierce* and *Yoder* than in a society whose highest court would have decided those two cases in the opposite way.

3. Cases in State Courts

During the latter part of the 1970s a rash of litigation began to appear in the state courts (primarily[26]) that arose out of a new militancy on the part of fundamentalist Christian day schools. For several decades Protestant fundamentalists had been building "Christian schools" in conjunction with their local churches in large part because of dissatisfaction with "godless" public schools, and in the mid-1970s some of them came to feel that it was not consistent with their faith to allow those schools to be licensed or regulated by the state.

a. The Shape of the Conflict. The evolution of the consequent confrontation between church and state was described in some detail in *Bangor Baptist Church v. Maine*, indicating that some Christian schools had initially obtained state approval or licensure and advertised the fact as evidence of academic quality attested to by the state. Then, following what might in liberation-theology circles (of which these schools definitely are not part) be called "conscientization," some of them began to refuse to comply with the requirements of the state necessary to retain their approved status, and some newly erected schools declined to apply for state recognition as a school accredited under the compulsory education laws, so that children attending them risked being declared truant. As a matter of principle, the schools resisted state licensure, certification of their teachers or approval of their

26. An exception is *Bangor Baptist Church v. Maine*, 576 F.Supp. 1299 (1983) in the federal district court for the District of Maine.

curriculum. Some even refused to notify the state of their existence or to report the identities of the pupils attending them. As the court in *Bangor Baptist* characterized their views, they believed

> that their church schools were integral parts of their religious ministries and not susceptible, either on constitutional or biblical authority, to state control, because acquiescence to any form of state approval of church-school teachers, principals or curricula would violate their biblically-based religious conviction that Christ, not the state, is sole sovereign in such matters.... [A]cquiescence to state approval might imply a state right-of-control... [that] might later be used in court to demonstrate that their professed religious beliefs regarding state control were based on non-religious preferences, rather than religious convictions.

Many of the churches/schools taking this position did not object to meeting the health, safety and sanitation requirements of the state, were willing to employ teachers who would meet the standards of certification by the state (but who would not *obtain* state certification) and would permit state officials to make on-site visits to observe the schools in action.[27] What they would *not* do was to recognize the state's right to register and regulate them. Curiously, that seemed to be precisely what the state insisted on, while ostensibly being willing to relax almost any of the specific requirements.

> The Commissioner asserts an affidavit that certain of the information required by the form of application... need not be provided by the plaintiff schools and that it is the policy of the Department to waive, on request, any regulatory requirement "to accommodate... religious... schools," provided "the basic requirements of the compulsory education laws...will not be unduly compromised." The Commissioner further proposes relaxation of the teacher certification requirements, stating that church-school teachers need not obtain certification "if this is against their religious convictions," but need only "demonstrate qualification for certification...." With respect to the request for information regarding school financial position and policies, the Commissioner asserts that church-schools need only identify their religious affiliation... and that church-schools need not provide information regarding school tuition policies. Finally, the Commissioner states that private schools ineligible for public tuition funds, which neither wish to obtain five-year approval status nor seek indirect public aid, through textbook loans, medical services, remedial service or standardized testing, need not provide, with their initial application, information regarding their educational philosophy, goals and objectives.[28]

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27. See stipulation offered in *Bangor Baptist Church, supra*, at 1304.

28. *Bangor Baptist Church v. Maine*, 459 F.Supp. 1208 (1982), ruling on motions prior to the proceeding reported at 576 F.Supp. 1299 (1983), *supra.*

But the commissioner insisted that the schools had to *apply* and submit at least five kinds of *minimum* information, viz., evidence that the school:

> 1. has been inspected by the Department of Health Services for compliance with state health and sanitation standards; 2. has been inspected by the Fire Marshal for compliance with the Life Safety Code; 3. offers a course of study meeting the minimum curriculum requirements; 4. has an instructional staff which is either certified or qualified for certification; and 5. maintains and safeguards adequate attendance, health and academic records.[29]

The schools did not submit such evidence, and litigation ensued.

This review is intended to suggest the general outlines of the conflict over attempts by state departments of education to assert their claims over church-related schools, some of which resisted those claims. The particulars of state requirements might differ from state to state, but the main lines of the controversy were quite similar. The outcomes, however, were quite diverse, depending upon peculiarities of state law in large part, but also on the strategies of litigation being pursued, on which there were two distinct schools of thought. One favored a bare-bones assertion that the state had no authority to supervise or regulate religious schools. It eschewed an argument of "excessive entanglement" of the state with religion because that would concede that the state had a right to some lesser degree of entanglement.

The other school of thought, typified by William Bentley Ball of Harrisburg, Pennsylvania (who argued many of the following cases), sought to build a record showing the pervasive nature of state regulation. Both schools of thought were recognized in *Bangor Baptist*, and it is noteworthy that the school at bar started out with the first school of thought, but switched to the second in midcourse and ultimately prevailed. As William Bentley Ball has commented on his litigative experience in this field:

> We must also note that governmental intrusion is frequently due merely to such a thing as the failure of particular public servants to have mastered the elements of English language as children. Our legislators and administrators have not been immune to the general national decline in literacy, and that fact becomes explosive when government demands compliance with words which form bundles of unintelligibility.... Most First Amendment cases arise, not out of bad intentions well expressed, but out of good intentions badly expressed....
>
> * * *
>
> [Sometimes] a statute gives a government agency plenary regulatory power over a class of institutions which indiscriminately includes religious institutions. The government agency, however, asserts that it will "go easy" on enforcement against a religious institution depending upon

29. Ibid., n. 15.

> whether the institution shows a proper "intent" by making a "good faith effort to comply" with the regulations.... Top Commonwealth officials under cross-examination, though unable to explain the meaning of numerous mandated state "standards" that would have to be met in order that an institution might win "approval" [e.g., Standard IV: "Major safeguards for quality education are... a profusion (*sic*) for a high degree of self direction..."], did state that the Commonwealth would be lenient towards an institution making a "good faith effort" to get in line. But the religious claimants wanted no "favors" or "leniency." They repeatedly testified that they believed in obedience to valid law, as contrasted with obedience to the accordion-like personal will of administrators.[30]

Ball made a point of having his clients acknowledge that they had no objection to sensible fire, safety, health and sanitation requirements, a recognition that the state does have a proper and legitimate responsibility for regulating those matters. That is, conscientious objection to the state's meddling in the content of a church school's curriculum or the qualifications of its teachers becomes more intelligible and credible if asserted from a base of recognition of, and compliance with, the state's *legitimate* regulatory functions.

b. *Ohio v. Whisner* (1976). One of the leading cases of this genre, though not the first,[31] was *Ohio v. Whisner*, in which the Rev. Levi Whisner and eleven other parents were indicted by a grand jury of Darke County, Ohio, for failure to send their children to "a school which conforms to the minimum standards prescribed by the state board of education." They had been sending them to Tabernacle Christian School in Bradford, Ohio, a school operated in conjunction with Tabernacle Christian Church, of which Whisner was pastor. Pastor Whisner at one point had met with the director of the Division of Elementary and Secondary Education of the State Board of Education in Columbus to try to work out a *modus vivendi* for the school. After the meeting Whisner wrote that official:

> Upon receiving a favorable response to this letter, we will submit to the Department of Education... a plan showing the total school organization and program. Such plan will contain information and commitments on our part corresponding to those contained in your publication "Minimum Standards for Ohio Elementary Schools," so far as is consistent with our religious beliefs.[32]

The Department of Education did not reply to this letter, and Whisner did not submit a plan. The court remarked, "Apparently, no further attempts were made by either the State Board of Education or by [the church] to resolve the situation concerning the operation of the Tabernacle Christian School through the

30. Ball, W.B., "Government as Big Brother to Religious Bodies" in Kelley, ed., *Government Intervention, supra,* pp. 22, 27.

31. It was preceded by a few months by *Vermont v. LaBarge*, 134 Vt. 276 (1976).

32. *Ohio v. Whisner*, 351 N.E.2d 750 (1976).

administrative procedures specifically devised for such purpose." And so the case went to court.

(1) "Minimum Standards." The state put on the administrator with whom Pastor Whisner had met. Defense counsel sought to elicit from this official just what the "minimum standards" were with which a school must comply in order to obtain a charter from the state. As William B. Ball described it:

> In the *Whisner* case, certain religious institutions, as the price of their existence, were commanded to comply with provisions contained in a volume bearing the Aesopian title, "Minimum Standards." The book was 125 pages in length and contained some 600 "minimum standards." Upon trial, our questioning of state officials necessarily proceeded along two lines. The first, of course, was to inquire what was really meant by a "standard" and how important the State believed these standards to be. The State witnesses were emphatic: the standards were a body of law; they were designed to insure high quality; they were supremely important. The second line of inquiry asked whether, in order to have State approval (and thus be able to exist), an institution must comply with 100 percent of the standards. Might not some be less significant than others? The State Benign promptly emerged: The State was no petty tyrant; of course it would not press 100 percent compliance. It would insist merely on "reasonable" or "substantial" compliance.
>
> Then came a question of naturally enormous practical consequence to the administrators of the religious institutions involved: "What percent compliance would therefore constitute a passing grade?" Here the State waffled and wasn't perfectly sure. But what that meant was that the State servants were provided *unlimited latitude* in life-or-death decisions relating to religious institutions.[33]

The 600 "minimum standards" occupied only the first 15 pages of the book. Then followed 110 pages of "Interpretative and Explanatory Information."

> On cross-examination, Brown attempted to explain the difference between [the two sections]....
>
> "The second part is not a part of the file with the Secretary of State, though they are there in compliance." [*sic*]
>
> Q. Are they not a part of the minimum standards?
>
> A. Yes, they are.[34]

The "interpretative and explanatory information" section in turn was divided into two levels. Ball asked the witness what was the status of the two levels as to the requirement of compliance.

> Q. Can level one be ignored by a school in terms of the department?
>
> A. Should not be.

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33. Ball, *supra*, pp. 27-28, emphasis in original.

34. *Ohio v. Whisner*, *supra*, p. 755.

> Q. Should not be. I will repeat the question. May level 1 be ignored by a school?
> A. No.[35]

Thus it appeared that the State Department of Education was prepared to insist on compliance with everything in the book.

(2) The Church's Objections to the Standards. When Pastor Whisner took the stand, he testified as to the religious basis of the school.

> He defined the Tabernacle Christian Church as "[b]eing historical and reaching back to the early church in the New Testament...." [He] testified that the members of the... church "don't engage in some things such as drinking, and card playing, and things of this nature that a lot would out here. We try to have a standard, and do enforce a standard of modesty, standard of humility, and a standard of sobriety, and a standard of prayerfullness [*sic*], and again, I say, a standard of separation [from sin and worldliness]."

These were apparently the school's "minimum standards."

> Rev. Whisner related that the school was founded because "we wanted to give our children a good spiritual and moral foundation. A Bible foundation to guide their lives, and prepare them for the hideous things that are surely there facing in this generation."
>
> With respect to the Tabernacle Christian School, Rev. Whisner testified that "[I]t is a religious school... a Bible oriented Christian school. It is a Christian school in the area that we feel that children need Bible guidance for their spiritual and moral foundations.... [W]e feel that our students need the influence of a Godly teacher, which we in our requirements for teachers that they be born again teachers [*sic*]. It is a religious school in the sense that we draw lines of separation from the world."
>
> [He] testified further that the Tabernacle Christian School does not receive any form of state or federal aid, and would not accept it if offered, because "[a]nything they give to you they control."
>
> With regard to the question of the interest of the state in the education of the children residing therein, [he] stated that "I believe the state has a right to expect and receive an adequate education. I think the state has a right to... see that they [the children] be safe and be protected."
>
> [He] testified that the school operates six hours a day, 180 days per year; that reports of daily attendance are made to public officials; and that the school admits public officials for the purpose of health, safety and fire inspection.

The woman who taught the children, a Mrs. Myrtle Smits (who was certified to teach in Ohio and three other states), testified that the program of education in the school "is very good." As corroboration of that view, she reported that her students'

35. Ibid.

achievement on the nationally recognized Stanford Achievement Test was "excellent. Of the 20 students who took the test, 18 performed well, and only two did not."

Professor Donald Erickson of the University of Chicago, an expert on nonpublic education, testified with reference to the "minimum standards:"

> "[They] go a long way down the road toward obliterating any distinction between public and private education;"... the standards are not neutral in that a philosophy of "secular humanism" is espoused therein;... enforcement of the standards would "in effect take away from the school the right to run its [own] philosophy;" that the... curriculum content required by the standards are, educationally, "very close to nonsense;" that there is no apparent reason to impose teacher certification requirement upon non-public schools;... that Ohio's minimum standards "are about the weakest way I know of to try to accomplish what they are designed to accomplish, and that is to make schools better."

Some of the specific objections the defendants expressed to particular standards were as follows:

> 1. ..."A charter shall be granted after an inspection which determines that all standards have been met." (Appellants do not desire a charter, because acceptance of same would constitute their agreement to comply with all standards, and thereby effectively remove their ability to control the direction of the school by reposing vast powers in the hands of the state.)
>
> 3. ..."All activities shall conform to policies adopted by the board of education." (... [T]his standard virtually provides a blank check to the authorities to control the entire operation of their school.)
>
> 4. ..."Efforts toward providing quality education by the school for the community it serves shall be achieved through cooperation and interaction between the school and the community...." (Appellants maintain that a Christian school cannot seek its direction from the world or from the community it serves.)

Defendants also objected on religious grounds to some of the adjurations in the 110 pages of "Interpretation and Explanatory Information."

> 1. ..."When a pupil transfers... pertinent pupil information is forwarded to the principal of the receiving school. Office records of this nature are not released to parents and guardians." (Appellants contend that it is very important for a parent to be apprised of everything occurring in school relating to his or her child or children.)
>
> 2. ..."Common problems are solved through the consensus of thinking and action of individuals in the group...." (Appellants reject [this] idea..., because they instead adhere to the belief that problems are solved by the group on their knees [that is, by divine guidance rather than consensus]. In addition, [they] contend that these comments reflect a philosophy of

> "secular humanism" on the part of the state—a philosophy to which [they] cannot, consistent with their religious beliefs, ascribe [*sic*].)
>
> 3. ..."Organized group life of all types must act in accordance with established rules of social relationships and a system of social controls." (Appellants again object to the "humanism" philosophy allegedly espoused herein.)
>
> 4. ..."The health of the child is perhaps the greatest single factor in the development of a well-rounded personality.... [H]ealth education... becomes increasingly important as automation, population growth, changing moral standards and values... create new or intensify existing health problems." (Appellants contend that although man's standards may change with respect to moral values, God's does not.)

(3) Conclusions of the Trial Court. The trial court was not taken in by all this testimony, which it viewed as "rhetoric."

> When shorn of all the rhetoric surrounding this case the defense rests solely upon the contention that the minimum standards are vague; that they admit of several interpretations; that they are not rationale [*sic*]; that they deprive the defendants of the freedom of religion in their school and that the defendants are unable to comply.

The court thought the religious objections to the minimum standards a mere "afterthought."

> In other words, they did not specifically exist prior to the return of the indictments and constitute the results of a hasty effort thereafter to prepare a defense thereto.

And the court was not impressed with the expert witnesses.

> Both appeared to the court to be hard pressed for specific objections [to the standards] and some that they referred to could only be termed as "grasping at straws."
>
> * * *
>
> Mr. Erickson agrees that the state has far reaching fundamental educational responsibilities and that it must regulate education. He then states that the state can fulfill its responsibilities without prescribing how people must be educated; where they must be educated; what kind of buildings they must be educated in; what must be in the program and what must be the nature of the individual who instructs them. Query what is there left to be regulated?

(Apparently it boggled the court's mind to think that the state should not have a great deal of regulating to do!)

> Mr. Erickson also objects to standards for certification of teachers. Surely one cannot object to his child being taught by a qualified person any more than one would object to licensing of an engineer, doctor, dentist, lawyer.

(Apparently the court had not conceived the possibility that licensing does not necessarily insure qualification, let alone effectiveness, in these other fields any more than in teaching.[36])

> Again shorn of all the rhetoric the basic thrust of the defense appears to be that there should be two sets of standards, one for tax supported schools and another of lesser requirements for Church or private schools. Surely to do so would deny the children attending these schools of lesser requirements of the right to equal educational opportunities.

The court took some consolation in the observation that "counsel for the defendants do not attack the well established law of this state and nation," by which the court meant:

> The established principle that the natural rights of a parent to the custody and control of an infant child are subordinate to the power of the state; that a parent has an obligation to educate not only to the child but to the state; that the state has the power and duty to promulgate minimum standards for the education of its children and that compulsory education laws have been universally upheld as constitutional.

This remarkable exaltation of the powers of the state over those of parents in education seems to have evolved in the court's mind in blithe unawareness of the memorable charter of parental rights in *Pierce*, reaffirmed in *Yoder*.

Bolstered by this confident view of the law, the trial court had no difficulty finding the defendants guilty as charged. From the Court of Common Pleas, appeal was taken to the Court of Appeals of Darke County, where an equally learned judge upheld the trial court, opining:

> The only specific objections to the Minimum Standards are contained in the testimony of Rev. Whisner..., and his testimony, however well meant, is inadequate to justify on religious grounds a complete departure from the minimum standards of the State Department of Education.... As a whole, his testimony reflects the subjective attitudes of the members of his congregation, and his reasoning is based essentially upon a subjective interpretation of biblical language.

What other kinds of attitudes and interpretations might there be that would not equally be describable as "subjective"? What else *is* religious faith, commitment and understanding but "subjective"—meaning formed and adopted by the action of each individual's conscience?

The appellate court had apparently heard of *Yoder*, and even quoted from it—at least to the effect that "there is no doubt as to the power of a state... to impose reasonable regulations... [in] education," and "the very concept of ordered liberty

36. See Baron, David S., "Licensing: The Myth of Government Protection," in *The Barrister* (1980); Mr. Baron was Assistant Attorney General of Arizona at the time of writing.

precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests," and "A mode of living, or way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education...."[37] In other words, the court combed out of *Yoder* the few *caveats* or boundary *dicta* that served its purpose and quoted only those. The whole thrust of *Yoder* was to the contrary; at least it required a sifting of the truly important from the unimportant on the basis of compelling state interest.

The appellate court seemed more adroit than the trial court in paying lip service to liberty but denying it protection in the actual case before it.

> In the *Yoder* case, considerable emphasis was placed upon the deeply-rooted religious convictions of the Amish community and the relationship between those religious convictions and the interest of the public. In fact, a good look at the worthy cause espoused by Jonas Yoder tends to accentuate the deficiencies of the evidence presented in the instant case.
>
> Here, the appellants' rhetorical adaptation of the Free Exercise Clause is tempered noticeably by the testimony of Rev. Whisner that his own daughter attends a state chartered school and that his son attends a public university....
>
> * * *
>
> [T]he state must yield to the paramount right of parents to provide an equal education in private schools, and the public interests must weigh heavily to overbalance any recognizable claim to the free exercise of religion.

Was the court leading up to a vindication of the "paramount rights" of Pastor Whisner and his fellow defendants? Hardly.

> However, it is manifest that the constitutional protection of every view embodying religious characteristics, however good and wholesome, would eventually lead to the destruction of both the public and private school system.

It certainly would never do, then, in this court's estimation, to go protecting *every* view just because it has some religious "characteristics." How that would destroy all school systems is not immediately apparent, but the court was in no doubt as to the proper disposition of the instant case.

> In the present case, the state was under a duty to defend every requirement and recommendation in the Minimum Standards.... Its case was complete when it showed that the appellants failed or refused to submit a basic plan showing compliance with any minimum standards.

37. *Ohio v. Whisner*, quoting *Wisconsin v. Yoder, supra.*

> The motives of the appellants cannot be challenged.... [B]ut the constitutional protection afforded by the Free Exercise Clause must rest upon a stronger foundation than portrayed by the record in this case.

Shorn of all their rhetoric, these decisions signified that the Tabernacle parents weren't Amish, so the state prevailed.

The lower court opinions have been quoted at some length to illustrate their signal lack of receptivity to religious claims. The record in this case was elaborate, impressive and comprehensive. The defendants were patently and transparently devout, earnest and committed people. The state regulations were poorly written, vague and overbroad, open-ended, confusing and clearly in conflict with the defendants' sincere religious convictions. Yet the lower courts upheld the power of the state against the clear Free Exercise claims of the defendants, not just despite *Pierce* and *Yoder*, but quoting *Yoder* to justify a result for which *Yoder* does not stand!

(4) The Supreme Court of Ohio. Fortunately, the Supreme Court of Ohio, in an opinion written by former Secretary of Health, Education and Welfare of the United States, Anthony J. Celebrezze, took a very different tack and reversed the courts below.

> With regard to appellants' assertion that the state's "minimum standards," as applied to them, unconstitutionally interfere with their right freely to exercise their professed religious beliefs, both the Court of Appeals and the Court of Common Pleas committed error in failing to accord the requisite judicial deference to the veracity [validity?] of those beliefs. Indeed, both courts *questioned* whether appellants' beliefs were founded upon religious principles, with the Court of Common Pleas labelling appellants' religious beliefs "an afterthought..."
>
> * * *
>
> However, at this date and time in the history of our nation, it is crystal clear that neither the validity of what a person believes nor the reasons for so believing may be contested by an arm of the government.... The applicable test was enunciated in *United States v. Seeger*... in these words: "...that while the `truth' of a belief is not open to question, there remains the significant question of whether it is `truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact...."
>
> Based upon the extensive record before us, there can be no doubt but that appellants' religious beliefs are "truly held...." [T]hese appellants are God-fearing people with an abiding religious conviction that Biblical training is essential to the proper inculcation of spiritual and moral values into their youth at a time when such precepts are most likely to take root—during the formative years of educational growth and physical development. In this regard, appellants' testimony unmistakably emphasizes their collective dissatisfaction with the form of the education provided by the public schools of this state, and their total religious

> compulsion that their offspring be educated in the word of God according to their religious scruples. Moreover, the sincerity of appellants' religious beliefs can best be illustrated by the very fact that they are willing to subject themselves to the criminal process of this state in order to vindicate their position.

After reviewing the appellants' religious objections to some of the Minimum Standards, the court said, "[W]e must conclude that the compendium of `minimum standards' promulgated by the State Board of Education, taken as a whole, `unduly burdens the free exercise of [appellant's] religion.' *Wisconsin v.Yoder*."

> To begin with, although admittedly an admirable effort to extol the secular aims of the state in assuring that each child educated in this state obtains a quality education, we believe that these "minimum standards" overstep the boundary of *reasonable* regulation as applied to a non-public religious school.
>
> It must be remembered that one of the "minimum standards" requires compliance will [with] all such standards before a charter can be granted.... This is so despite the fact that the statutes upon which the "minimum standards" are based... do not expressly require such absolute compliance....
>
> * * *
>
> [Another standard that] requires "all activities" of a non-public school to conform to policies adopted by the board of education plainly violates appellants' right to the free exercise of their religion. If the state is to discharge its duty of remaining strictly neutral, pursuant to the establishment clause of the First Amendment, with respect to religion, how can the state constitutionally require *all activities* of a nonpublic religious school, which, of necessity, must include *religious activities,* to conform to the policies of a purportedly "neutral" board? As stated long ago in *Bd. of Edn. v. Minor* (1872)...
>
> "*** The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt?
>
> * * *
>
> "But it will be asked, how can religion, in this general sense, be essential to good government? Is atheism, is the religion of Buddha, of Zoroaster, of Lao-tse, conducive to good government?... Certainly the best government requires the best religion. It is the child of true religion, or of truth on the subject of religion, as well as on all other subjects. But the real question here is, not what is the best religion, but how shall this best religion be secured? *I answer, it can best be secured by adopting the doctrine of... our own bill of rights, and which I summarize in two words, by calling it the doctrine of `hands off.'* Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off

> each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest,—that is, the intellectually, morally, and spiritually weakest—will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of `church and state'.... It is simple and easily understood. It means a free conflict of opinions as to things divine; and *it means masterly inactivity on the part of the state*, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public peace. Meantime, the state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. *It means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that although he be in the minority, he shall be protected in the full and unrestricted enjoyment thereof*. The `protection' guaranteed... means protection of the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many." (Emphasis added.)

This long quotation was from the superb Ohio opinion in *Board of Education v. Minor*, (1872). Justice Celebrezze quoted more of it than is given here. The emphasis in the quotation is his.[38]

> Finally, [the standard] which requires a nonpublic religious school to cooperate with elements of the community in which it exists, infringes upon the rights of these appellants, consistent with their religious beliefs, to engage in complete, or nearly complete, separation from community affairs. As Rev. Whisner testified, these appellants religiously adhere to the literal Biblical command that they "[b]e not conformed to the world...." Upon the face of the record before us, the state may not require the contrary.
>
> * * *
>
> There is an additional, independent reason, ignored by the lower courts in this case, that compels upholding appellants' attack upon the state's "minimum standards." In our view, these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children.
>
> * * *

38. For further discussion of that important case, see § C2a(4) below.

> The "minimum standards" under attack herein effectively repose power in the State Department of Education to control the essential elements of non- public education in the state. The expert testimony... unequivocably demonstrates the absolute suffocation of independent thought and educational policy, and the effective retardation of religious philosophy engendered by application of these "minimum standards" to non-public educational institutions.
>
> Through application of these "minimum standards" to non-public schools, the state retains the right to regulate the following: the content of the curriculum that is taught, the manner in which it is taught, the person or persons who teach it, the physical layout of the building in which the students are taught, the hours of instruction, and the educational policies intended to be achieved through the instruction offered. In short, what the state gives to a non-public school through including a requirement in the "minimum standards" that the operation of the school must be consistent with its own stated philosophy..., it takes away by compelling adherence to all the "minimum standards," the effect of which is to obliterate the "philosophy" of the school and impose that of the state.
>
> * * *
>
> In the opinion of a majority of this court, a "general education of a high quality" can be achieved by means other than the comprehensive regimentation of *all* academic centers in this state. In the words of Thoreau:
>
> "If a man does not keep pace with his companion, perhaps it is because he hears a different drummer. Let him step to the music he hears, however measured or far away."

The final question was whether there was a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." The court disposed of that with almost anticlimactic brevity:

> The state did not, either in this court or in the lower courts, attempt to justify its interest in enforcing the "minimum standards" as applied to a non-public religious school. In the face of the record before us, and in light of the expert testimony summarized in the statement of the case herein, it is difficult to imagine "*** a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause...." And, equally difficult to imagine, is a state interest sufficiently substantial to sanction abrogation of appellants' liberty to direct the education of their children. We will not, therefore, attempt to conjure up such an interest in order to sustain application of the "minimum standards" to these appellants.[39]

Three judges concurred in the opinion, while two dissented from the opinion but concurred in the judgment. The two dissenting judges entered their own opinion to the effect that the majority had imputed a strictness to the "minimum standards" as

39. *Ohio v. Whisner*, 351 N.E. 750, 771-773 (1976).

applied to nonpublic religious schools that was belied by the wording of the statute itself, which provided that:

> In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said school, provided they do not conflict with provisions of a general education of a high quality....

The dissenters contended that "this provision clearly belies any claim that the minimum standards formulated by the board are to be strictly imposed upon nonpublic schools." This laudable confidence in the flexibility of the state education department might better have been addressed to the officials of the bureaucracy who evidenced in their testimony no great disposition to indulge the Tabernacle Christian School in the matters most important to it.

The dissenting judges thought the school was in no position to challenge the application of the statute or the minimum standards to it anyway, "for the Tabernacle Christian School has made no actual application to the state board for a charter." This was the "don't-cry- until-you're-hurt" response, which is not properly applicable to prospective violations of constitutional rights. As James Madison wrote in his famed "Memorial and Remonstrance,"

> [I]t is proper to take alarm at the first experiment on our liberties.... The freemen of America 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.[40]

This "don't cry until you're hurt" contention was discussed in *Bangor Baptist Church v. Maine*, *infra.*

The dissenting judges did not believe that the statute or its application need be considered unconstitutional, though they admitted that their view of its effect did seem to differ from that advanced by the state as well as by appellants, but since the issue was posed in a criminal prosecution, they agreed that the instant convictions should be reversed and the defendants discharged.

In a similar case in Vermont, the state supreme court found a certain slippage between the statute under which parents were prosecuted and the powers claimed by the state department of education. "The truancy statute speaks in terms of `equivalent education' not in terms of `approved schools.' In other words, the truancy statute cannot be taken to require attendance exclusively at `approved schools.'... Reading `approval' for `equivalent education' would subject parents to truancy complaints if the school, for example, failed to acquire sufficient library resources or even library tables and chairs to keep up with enrollment.... This is hardly

40. Quoted in *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947).

justification to convert innocent acts for the benefit of children into crimes on the part of parents.... [T]he prosecution must fail."[41]

The supreme court of Kentucky reached a similar conclusion on the basis of a clause in the state constitution that provided "...nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." The state department of education insisted that it was empowered to monitor the *quality* of education provided in private schools, as by requiring certified teachers and state-approved textbooks, but the court disagreed.

> It cannot be said as an absolute that a teacher in a non-public school who is not certified... will be unable to instruct children to become intelligent citizens. Certainly, the receipt of "a bachelor's degree from a standard college or university" is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelligently exercise the elective franchise.
>
> The Commonwealth's power to prescribe textbooks for use in private and parochial schools is likewise limited.... The textual materials used in the public schools are at the very heart of the conscientious opposition to those schools. To say that one may not be compelled to send a child to a public school but that the state may determine the basic texts to be used in the private or parochial schools is but to require that the same hay be fed in the field as in the barn. Section 5 [of the state constitution] protects a diversified diet.

The court therefore concluded that the Commonwealth was *required* to approve a private or parochial school "unless it demonstrates the educational institution in question is not a `school' as contemplated by the constitutional convention or does not serve to educate the children of Kentucky to enjoy their right of suffrage."[42]

The strategy of William Ball fared less well in Michigan. Though the parent-patrons of an unapproved religious school prevailed in the trial court, the appellate court was not impressed. With regard to the contention that standardized testing of pupils would be a less intrusive method of determining the quality of private education than requiring certification of teachers, the court harkened to the conclusion of a sister state, North Dakota, on that issue.

> "Standardized testing ordinarily does not result in the discovery of a deficiency in education until after the term, semester, or the school year is over, which would, in effect, result in a child wasting its period of time if the results of the standardized test indicated that the child's education was deficient. We do not believe such a result would satisfy the state's interest in educating its youth.

41. *Vermont v. LaBarge*, 134 Vt. 276 (1976).
42. *Kentucky v. Rudasill*, 589 S.W.2d 877 (1979).

> Although we are cognizant that teacher certification may also have its deficiences, we believe that teacher certification is an acceptable method of satisfying part of the constitutional mandate of the legislature to properly provide an education for its youth."[43]

The court viewed the certification of teachers in the context of state licensure of other professions (although no First Amendment objections to licensing of other professions had been posed), and thought that it would be reasonable for the legislature to seek to protect consumers from incompetence among teachers as well as engineers, lawyers, beauty operators, welders and pipe-fitters by means of certification or licensure. But when the claim is made that state regulation interferes with the free exercise of religion (or with other First Amendment rights), the tests normally must escalate to a higher level:

> [O]nly those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.... [Even a] regulation neutral on its face may, in its application, nonetheless offend... if it unduly burdens the free exercise of religion.[44]

But the Court of Appeals did not reach that conclusion. Instead it upheld the state's claim of authority to regulate private schooling.

> Plaintiffs have urged that there is no compelling state interest in any of the specific state requirements involved in this case, but this argument misplaces the emphasis. The issue is not whether there is a compelling state interest in any individual regulation but whether the individual regulations are reasonable means to give effect to a broader compelling state interest—in this case the provision of an education to all children. For the reasons stated herein, we believe the regulations are a reasonable exercise of state authority in the field of education.[45]

c. *Bangor Baptist Church v. Maine* (1983). In contrast to the case just considered, the U.S. District Court for the District of Maine took a tack similar to the Ohio court.

> [I]n 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 that the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not

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43. *Sheridan Road Baptist Church v. Michigan*, 348 N.W.2d 263 (Mich. App. 1984), quoting *Rivinius v. N. Dak.*, 328 N.W.2d 220, 229 (1982).

44. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); but see *Oregon v. Smith*, 494 U.S. 872 (1990), which eliminated the compelling state interest test for most free exercise claims (discussed at IVD2e). That test was legislatively reinstated by Congress in the Religious Freedom Restoration Act in 1993.

45. *Sheridan Road Baptist Church, supra.*

> step aside and await a course of events which promises to raise serious Constitutional problems.[46]

That burden was not met by the state's simply asserting that its regulating activity would not infringe upon religious freedom, or the court's simply assuming that it would not (as seemed to be the case in *Sheridan Road Baptist Church*, above).

> The defendants contend that the imposition of the challenged regulations would place no burden on plaintiffs' religious practices. On the contrary, the burdens clearly appear, though their extent remains subject to proof at trial.... Once it is recognized that the regulatory scheme imposes *some* burden on plaintiffs' religious practices, it is clear that defendants have yet to meet their burden of showing that no excessive entanglement would result from the imposition of the scheme upon plaintiffs. It is no answer that plaintiffs should be required to submit the requested information (in whatever form) and await litigation "down the line" if and when specific disputes arise.[47]

The foregoing comments were made in connection with the state's motion seeking summary judgment, which was granted with respect to several challenges based on vagueness, overbreadth and *ultra vires*,[48] but denied with respect to other issues that subsequently went to trial. The basic issue at trial was whether the state could close down a school not meeting the standards set by the state department of education. The state statute provided that every child of age seven or older must attend a public school until age seventeen, except for those children obtaining "equivalent instruction in a private school," or the parents would be subject to penalties for the child's truancy. The court concluded that the statute had not delegated power to the state board of education to "impose direct sanctions against *unapproved* private schools."[49]

The state had contended that the statute *implied* that "an *unapproved* private school *may not operate at all* during normal public school hours with compulsory school-age children in attendance."[50] But the court held this implication to be contrary to the plain wording and long history of the legislation, "leaving no room for an administrative interpretation at odds with both." The legislature clearly intended that problems of possible truancy were to be dealt with by local public schools

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46. *Bangor Baptist Church v. Maine*, 549 F. Supp. 1208, 1221 (D.M. 1982), quoting *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 75-6 (CA1, 1979); emphasis in original. *Bangor Baptist* was discussed in § a above.

47. *Bangor Baptist*, *supra*, at 1222.

48. "Vagueness" is the quality of a statute such that a person of reasonable intelligence cannot discern what conduct it permits and what it prohibits. "Overbreadth" is the quality of a statute such that it punishes conduct not only within the power of the state to punish but conduct that is protected by the Constitution. *Ultra vires* is the exercise of a governmental official or agency beyond the authority it possesses.

49. *Bangor Baptist Church v. Maine* [II], 576 F.Supp. 1299 at 1314, emphasis in original.

50. Ibid., paraphrasing defendants; emphasis in original.

authorities, investigated by local attendance officers, who were elected annually by the local school board, and disposed of at the discretion of the local board, subject to an appeal to the state commissioner of education. No power was delegated to the state authorities to short-cut this process by closing unapproved private schools.

> The Court is therefore satisfied that... [no] statutory provision prohibits private schools from operating merely because they are unapproved or refuse to seek or accept approval.

This outcome had been foreseen by the commissioner as unsatisfactory.

> The Commissioner testified that, if it were held that truancy actions against the parents of children attending unapproved church schools offered the only means of enforcing the school approval laws and regulations, he would "act through the courts" rather than institute truancy actions..., and that before he could pursue truancy actions against parents he would first have to obtain legislative authorization for additional funding and staff.

Consequently, no truancy proceeding had ever been commenced against parent or guardian of any child attending any unapproved private school, including the plaintiff religious schools.

The court held that the commissioner was not entitled to an injunction closing the schools when an adequate remedy at law—and the only one authorized by the legislature—was available and had not been used. Furthermore, the court added in a footnote, the commissioner's supposition that *he* would have to get more money and more staff if *he* was to enforce the statute through truancy prosecutions "reflects [his] consistent misconception as to the legislative placement of primary responsibility for the enforcement of the truancy laws.... [T]he Maine legislature has imposed that responsibility primarily upon *local* public school officials."[51]

But the state contended that the religious schools were undermining the public school system, that the very operation of unapproved private schools constituted an "inducement to truancy"—a serious offense under Maine law, punishable by a fine of *not less than $500*, compared to a fine of *not more than $200* for being "responsible" for the truancy of a child. The court held that "*mere operation* of these unapproved schools... does not constitute an inducement of habitual truancy."[52]

> Indeed, defendants' threatening assertion, that "the plaintiffs... induce their students to attend their unapproved schools,"... appears to refer to the religious edification of parishioners by the plaintiff pastors. There can be little doubt that in every sense of the word pastors do "induce" parishioners to send their children to church-affiliated schools and that the threatened enforcement actions raise serious constitutional questions....

51. Ibid., n. 56, emphasis in original.
52. Ibid., at 1323. See reference to *minumum* fines as punitive in ID1b. Emphasis in original.

> Prosecution of the pastors or the administrators of church schools for inducing truancy, whether in sermons or in other communications with students or parents in the congregation, would raise fundamental free speech and free exercise concerns.... Defendants have not suggested any "grave[] abuses, endangering paramount interests" which would justify the threatened restraints....
>
> Plaintiffs therefore are entitled to declaratory and injunctive relief precluding defendants from bringing actions against them on the grounds that they induce truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children.[53]

Here a federal court construed state law against a state officer on a rather narrow and seemingly technical basis. But the opinion included some significant language to the effect that the state has the burden of justifying interference with the free exercise of religion and that preachers are not to be prosecuted for inducing parents to send their children to Christian schools.

d. ***Nebraska ex rel. Douglas v. Faith Baptist Church*** **(1981).** Perhaps the most notorious case in this genre was the struggle of the state of Nebraska against Pastor Everett Sileven and the Faith Baptist Church of Louisville that led to the imprisonment of the pastor and several of the church leaders and parents for contempt of court and the padlocking of the church to prevent the operation of a church's Christian day school because of noncompliance with state regulations. The Nebraska Supreme Court had upheld the position of the state Department of Education in its insistence on certification of teachers and compliance with other regulations. The church resisted even notifying the state of the names of the pupils attending. The court had sustained the credentialing of teachers for reasons discussed earlier, and came down hard on the right of the state to regulate private education:

> The refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.[54]

That was not the end of the struggle, but the beginning. At first, following its loss in court, the church operated both in "exile" across the border in Iowa and "underground" in Nebraska until January 1982, when it reopened at Faith Baptist Church. When he refused to close it down or comply with state regulations, Pastor Sileven was sentenced in February 1983 to four months in jail for contempt of court. He was released in March after the church voted to close the school, but two weeks

53. Ibid., at 1333-5; quotation is from *Thomas v. Collins*, 323 U.S. 516. 530 (1945).

54. *Nebraska ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981), appeal dismissed by U.S. Supreme Court for lack of a substantial federal question (Oct. 1981).

later the school reopened. In August Sileven was returned to jail to complete his sentence, and the state padlocked the church on weekdays to prevent the operation of the school. This drew a crowd of some 800 persons, many of them fundamentalist ministers from other states, who occupied the church and continued the operation of the school.

During 1983 as many as twenty-five other unapproved schools were operating in Nebraska. Efforts were made in the legislature to work out a compromise acceptable to both sides, but without success. In November 1983, seven fathers of students at Faith Christian school were jailed until February 1984 for refusing to answer a judge's questions about the school. Their families fled the state to avoid the same fate. This brought additional unwelcome national attention to the state. Jerry Falwell and Jesse Jackson came to survey the situation (though not together). The U.S. Department of Justice considered intervention, and the U.S. Secretary of Education threatened to reexamine Nebraska's eligibility for federal funds for education. The governor appointed a special panel to investigate and recommend a solution. In January 1984 the panel came to the (revolutionary) conclusion that "some accommodation to the First Amendment freedom of religion claims of the Christian school supporters must be recognized."

The state legislature enacted the panel's recommendations into law in April 1984. The upshot was that the new law did not require private schools to provide any information to state officials. Instead, parents who sent their children to such schools must satisfy the state that their children were receiving an adequate education by submitting an "information statement" that attested their children were attending school for 175 days a year and were being instructed in core curriculum subjects.[55] This represented a rather complete capitulation on the part of the state, due in part to the unwillingness of the state's leaders to continue to appear in the spotlight of national publicity as the jailers of ministers and parents whose only offense was civil disobedience for the sake of conscience.

At the time the Faith Baptist struggle was going on, a much more reasonable defense was being mounted by William Ball for a fundamentalist school in Lincoln, Nebraska, that did not object to fire, safety and health regulations nor to reporting the attendance of pupils. It might have gone down to defeat under the precedent set by the anarchistic stance of the Sileven group, which had precipitated the hard-line ruling from the state Supreme Court in *Nebraska ex rel. Douglas v. Faith Baptist Church*, or it might have offered a reasonable middle ground for compromise that would have relieved the pressures on courts, administrators and legislatures. But, for whatever reasons, it was rendered moot by the final action of the state legislature in 1984, in what may be an unstable settlement, lasting only until the public education establishment gets its "second wind" and public attention is focused elsewhere.

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55. Devins, Neal, "Nebraska and the Future of State Regulation of Christian Schools," in Kelley, D.M., ed., *Government Intervention in Religious Affairs II* (New York: Pilgrim Press, 1986), p. 114.

e. ***New Life Baptist Church Academy v. East Longmeadow*** **(1989).** In Massachusetts a similar contest occurred between a Baptist private school and the local public school committee, to whom the law of the commonwealth entrusted responsibility for approving private schools within its bounds. The Academy contended that the East Longmeadow School Committee's procedures for evaluating the private school—gathering written information about curriculum and teachers' credentials—were intrusive on its free exercise of religion and could be better served by standardized testing of students. The federal district court agreed, and held the school committee's proposed evalutation process violative of the Free Exercise and Establishment Clauses of the First Amendment. The school committee appealed, supported by the Commonwealth of Massachusetts as intervenor. The Academy's position was buttressed by briefs *amici curiae* from the Home School Legal Defense Association, the Christian Legal Society, the National Association of Evangelicals, the Southern Baptist Convention, the Association of Christian Schools and the Christian Legal Defense and Education Foundation.

The First Circuit Court of Appeals reviewed the record *de novo* and rendered its decision per Judge Stephen Breyer (elevated to the U.S. Supreme Court in 1994).

> For ease of analysis, we shall consider the Academy's constitutional "free exercise" claim by asking two distinct questions: First, does the First Amendment's Free Exercise Clause forbid the state (i.e., the School Committee) to insist upon approving the secular education offered by a religious school that believes it sinful to submit even its secular education program to the approval of secular authorities? Second, if not, does the Free Exercise Clause forbid the School Committee to follow its proposed procedures rather than the "standardized testing" procedures that the Academy prefers?...
>
> We believe the legal answer to the first question is clear. The Free Exercise Clause does not prohibit the School Committee from enforcing, through appropriate means, a state law that requires "approval" of the Academy's secular education program. We concede that the Academy has a sincere, relevant religious belief that it ought not participate in any such secular approval process.... We also agree with the Academy that the very existence of a state approval requirement will burden the exercise of its religion by placing it under "substantial pressure... to modify [its] behavior and to violate [its] beliefs."[56]...
>
> Nonetheless, the state's interest in making certain that its children receive an adequate secular education is "compelling."... And no one in this case suggests any "less burdensome" way to guarantee the adequacy of the Academy's secular education than to subject it to *some form* of state evaluation process....

56. *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (CA1 1989), quoting *Hobbie v. Florida*, 480 U.S. 136, 141 (1987), discussed at IVA6i.

The second question—that of comparative means—is more difficult. Does the Free Exercise Clause permit the School Committee to use its preferred "information gathering" procedures (written information/teacher credentials/visits), or does it prohibit the Committee from doing so, because another procedure—the Academy's preferred method (standardized testing)—is a less restrictive alternative?

* * *

The term "least restrictive means," however, is not self-defining.... Consequently, our analysis—our effort to determine whether testing is, constitutionally speaking, a "less restrictive alternative"—must reflect additional guidance that the Supreme Court has provided, of three specific sorts.

First, the Court has repeatedly spoken of the need to "balance" compelling state interests against probable burdens upon religious freedom.[57]... Second, the Court has emphasized the need to determine the extent to which accommodation of religious belief will interfere with achieving the state's compelling interest.[58]

Third, the Court has made clear that administrative considerations play an important role in determining whether or not the state can follow its preferred means.[59] To understand this point, which is of particular importance here, consider the possibility that a particular religious group objects, not to a state welfare program, but to the method of distribution of welfare forms, or to the location of a welfare office, or to any of the myriad ways in which a state may choose to *administer* its welfare programs. One may find a *compelling state interest* in the state's providing welfare, but it is more difficult to say that the state's interest in *any particular means of distributing the welfare* is "compelling." That is, it is more difficult to say this *unless* and *until* one takes account of the need to have *some* reasonably stable and reasonably flexible administrative system. For, if it is *too* easy for religious groups with different religious beliefs to force (perhaps through time consuming litigation) differing, say, costly or complex, administrative accommodations with *too little reason* rooted in their religious faiths, then a rule of law that too readily requires such multiple administrative accommodations can itself become a rule of law that prevents the state from offering the welfare or education or other "compelling" program.... That is to say, the Free Exercise Clause must give the state some degree of administrative leeway in achieving compelling interests....

[W]e have concluded that the First Amendment does not preclude the School Committee from employing its approval procedures; the record

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57. Citing *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), *Bob Jones Univ. v. U.S.*, 461 U.S. 574, n. 29 (1983), *U.S. v. Lee*, 455 U.S. 252 (1982), etc., for dicta according greater weight to state interest than to free exercise claims.

58. Citing *U.S. v. Lee, supra, Wisconsin v. Yoder*, 406 U.S. 205 (1971), and *Braunfeld v. Brown*, 366 U.S. 599 (1961), for dicta representing "anchor-to-windward" boundary caveats supportive of the point adduced.

59. Citing *U.S. v. Lee, supra*.

reveals too many potential educationally-related difficulties, and too little alleviation of the burden on religion, to justify the district court's conclusion that standardized testing is a "less restrictive alternative."...

First consider the educational difficulties. The standardized testing system that the district court preferred is a voluntary system; but how can the School Committee find assurance that a child will receive an adequate secular education through reliance on a monitoring system that is *voluntary*? How can the Academy make certain the students and their parents agree to the testing plan? Suppose they do not. Suppose a parent refuses to permit the Academy to give the Committee the test results. Suppose a parent refuses to permit his child to participate in the testing, or in the remedial "follow-up."... Is the School Committee then to enforce truancy laws against the individual parent? Is it to demand expulsion of the child? Is it to "disapprove" the entire Academy?... It is difficult to see how a purely voluntary system for monitoring nonpublic education can serve the state's interest in securing educational quality.... Yet a system that relies heavily upon state laws to force testing requirements on individual parents threatens to burden their own religious freedom....

Furthermore, can the School Committee safely rely upon standardized testing to determine what *will* occur in the classroom? Teacher credentials, review of written curricula, and school visits offer the Committee a way of finding out what does actually occur in respect to teaching; tests, at best, reveal what *has* occurred. Can the Committee satisfactorily relate the results to past teaching? Does an average Academy pupil score lower than an average public-school-pupil score reflect inadequate teaching, inappropriate subject matter, a different student body background, or other factors having nothing to do with the "thoroughness and efficiency" of this private school, compared with public schools? Do equivalent test results mean comparable teaching or worse (or better) teaching to different kinds of student bodies?... Can [the Committee] be certain that good results reflect good teaching, *i.e.*, the teaching of intellectual skills, discipline and complete subject matter, rather than simply teaching the answers to questions the teachers believe will appear on tests? And how can testing measure those important aspects of an adequate education that do not readily reduce themselves to standardized test questions, aspects such as practical vocational skills, the "basic tools by which individuals might lead economically productive lives"... or the values of civic participation that are "necessary to the maintenance of a democratic political system"...? [If l]egally obligated to employ the method preferred by each religious group, the towns of Massachusetts might find it difficult to implement a coherent system of furthering the state's compelling interest in educational quality; but even in the absence of multiple competing demands, the questions we have raised indicate the formidable

> administrative hardships that the effort to develop a standardized testing system would impose upon the School Committee.[60]

The court had engaged in a far-ranging course of supposition of hypotheticals outside the record to suggest a "parade of horribles" that *might* ensue if standardized testing were to be adopted on a "voluntary" basis such as the Academy had proposed and the district court had approved. It did not indulge in a comparable conjectural excursion to explore the complications that might ensue in the alternative course desired by the School Committee. It seems fairly simple to envision that parents who wished to send their children to the Academy would do so with the understanding that those children would need to take standardized tests from time to time as part of their education, and that if they failed to do so, or failed to meet a certain level of achievement therein, they would no longer be eligible to attend the Academy and would then be obliged to go to the public school or to enroll in another private school. If they failed to follow one of those courses, they would be truant under the compulsory education laws, with no greater or lesser consequences than would befall any other truants. That standardized testing might have its shortcomings is understandable, but so do the devices used by the School Committee, as will be suggested in the next section.

The court's focus on administrative inconvenience as a justification for curbing rights protected under the First Amendment elevates to a level of importance a value that has never ranked high in American jurisprudence. The court went on to conjecture that the standardized testing procedure might prove as onerous to the religious autonomy claimed by the Academy as the School Committee's proposed procedures—which might indeed prove to be the case, but was not up to the court to determine. The Academy had expressed its preference on the basis of its religious understandings, and that choice was not properly subject to second-guessing by the court. Furthermore, the court stressed that "the weight of legal precedent is strongly against the Academy's position," citing a number of cases that it thought militated in one way or another against the Academy's claims.[61] The only cases it purported to find on the other side were *Wisconsin v. Yoder*, which it distinguished as involving a

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60. *New Life Baptist Church Academy, supra*, emphasis in original.

61. Including *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (CA8 1987); *Blount v. Dept. of Ed. & Cult. Services*, 551 A.2d 1377 (Maine 1988); *Johnson v. Charles City Bd. of Ed.*, 268 N.W.2d 74 (Iowa (1985); *Sheridan Road Baptist Church v. Dept. of Ed.*, 396 N.W. 373 (1986); *State v. Rivinius*, 328 N.W.2d (N.D. 1982); *State v. Patzer*, 382 N.W.2d 631 (N.D. 1985); *State ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571 (1980); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980); *Windsor Park Baptist Baptist Church v. Arkansas Activities Assn.*, 658 F.2d 618 (CA8 1981); *Blackwelder v. Safnauer*, 689 F.Supp. 106 (N.D.N.Y. 1988); *North Valley Baptist Church v. McMahon*, 696 F.Supp. 518 (E.D.Cal. 1988); *Jernigan v. State*, 412 So.2d 1242 (Ala. 1982); *Murphy v. Arkansas*, 852 F.2d 1039 (CA8 1988); *Duro v. District Atty.*, 712 F.2d 96 (CA4 1983); *Hanson v. Cushman*, 490 F.Supp. 109 (W.D.Mich. 1980); *Burrow v. State*, 669 S.W.2d 441 (1984); *People v. Turner*, 263 P.2d 685 (1953); *State v. Schmidt*, 505 N.E.2d 627 (Ohio 1986); *State v. Riddle*, 285 S.E.2d 359 (W.Va. 1981).

threat to the existence of a religious community not at issue in the instant case, and *Ohio v. Whisner*, which it characterized as involving burdensome, all-encompassing regulation not at issue in the instant case.

The court disposed of the Academy's claims under the "excessive entanglement" prong of the *Lemon* test of the Establishment Clause with equal facility, confident that the School Committee would be "reasonable" in its enforcement procedures and thus not incur an excessive entanglement of government with religion.

> We can imagine how the School Committee might, in practice, enforce the approval requirement and implement its proposed procedures (particularly the observation of classes) in ways that would unreasonably and unnecessarily entangle it with the religious aspects of teaching. But one might find similar theoretical possibilities lurking within virtually any state approval procedure.[62] Here, the proposal to observe classes is primarily a proposal to visit the school, to see if the school teaches what it says it teaches, and to observe children being taught such secular subjects as mathematics, geography, spelling, reading and writing. Additional visits will occur as an accommodation to the Academy only if the school fails to meet standards for its teachers' credentials, and then simply to see whether teachers, say, lacking university degrees, are able to teach secular subjects. We are aware of no case that goes so far as to find an Establishment Clause violation in such circumstances.... [W]e have no reason now to believe that the School Committee will implement its proposals in an unconstitutional way.... We therefore cannot find a violation of the Establishment Clause.[63]

f. The State's Interest. The state's claimed interest has been variously characterized, but the *Sheridan Road* court referred to it as an interest in "the *quality* of education" for all children without any searching analysis as to what that interest meant or how it was to be served. Later it quoted with seeming approval the Nebraska court's assertion that "the State has a compelling interest in the quality and ability of those who are to teach its young people." Was that an equal and independent interest, or was it ancillary to maintaining the "quality of education"? The *New Hope* court was similarly solicitous of the state's ability to maintain the *quality* of education. Certainly most people would concede that the state (meaning everyone) does have a compelling interest in insuring the adequate *civilizing* of all members of the population, so that none is dependent upon, or dangerous to, the rest by reason of ignorance, illiteracy or gross incompetence. Beyond this, everyone, through the instrumentality of the state, has a compelling interest in assuring that everyone who is able and willing has ample *opportunity* to gain the knowledge and understanding that is an important aspect—perhaps the most important aspect—of becoming fully human. The former is a negative interest—preventing ignorance; the

62. Such as the court itself had just discerned "lurking" in the standardized testing procedure?

63. *New Life Baptist Church Academy v. East Longmeadow, supra*.

latter, positive—providing knowledge. The former lends itself more readily to compulsion than the latter. One might even say that compulsion is not a very effective quality in either case. "Compulsory education" may be essentially a contradiction in terms, given the heavy accumulation of resentments and resistances that attempts to force learning generate.

For better or for worse, the human being is an incorrigibly inquisitive and discerning creature. There is virtually no way to *prevent* a child from learning—except perhaps to make learning repellant by coercion, regimentation and repression—qualities in which some public (and private) schools excel. It is tragic to see the bright-eyed wonder of a young child gradually discouraged by the sarcasm of unimaginative teachers anxious to preserve the school's routine and their own control of it. The literature of education is full of criticisms of public education— some of it hilarious, some of it infuriating.[64] There are even theorists who contend that the worst enemy of learning is the formal classroom itself. Readers of Ivan Illych and Paulo Freire[65] will have, at the least, misgivings about the value of conventional education standardized by the Education Establishment, which has been a powerful force in shaping the whole modern idea and practice of formal schooling to fit the prevailing professional concepts of the 1920s, so that now most unreflective laypersons tend to think that the conventional public school is what education *is* and *ought to be*. This, despite the known propensity of the proprietors of all great institutional systems—medicine, law, the postal service, the courts, prisons, hospitals, churches, trades, businesses, etc.—to make the system increasingly serve the interest of the proprietors at the expense of the consumers or clientele! So it is not iconoclastic to suspect that public schools may increasingly have come to serve, not so much their pupils, or their parents, or the public, as *the teaching profession*: teachers, principals, superintendents, state departments of education, schools of teacher education and their faculties; a mighty engine, geared up and going strong, producing—what? Many "graduates" who cannot read at a fourth-grade level? Who cannot do simple arithmetic? Who cannot write a coherent report or exposition? Who have few skills or habits of work that anyone would want to employ?

Private schools are not immune to this kind of institutional arteriosclerosis, but they have the advantage(?) of having to scratch a little harder to succeed. They do not have the monopoly of public funding that public schools enjoy, and so they must offer other incentives in order to compete on such an uphill gradient. As a result, some of them offer more individualized instruction, more "caring" teachers (even at

64. E.g., Goodman, Paul, *Compulsory Mis-education* (New York: Horizon Press, 1965); Holt, John, *How Children Fail* (New York: Pitman Pub. Co., 1964); Kaufman, Bel, *Up the Down Staircase* (Englewood Cliffs, N.J.: Prentice-Hall, 1964); Kohl, Herbert, *36 Children* (New York: New American Library, 1967); Silberman, Charles E., *Crisis in the Classroom* (New York: Random House, 1970).

65. Illich, Ivan, *Deschooling Society* (New York: Harper & Row, 1970); Freire, Paulo, *Pedagogy of the Oppressed* (New York: Herder & Herder, 1970).

lower salaries), more religious content, not to mention better discipline, greater safety, higher moral standards, less alcohol and drug addiction, etc. This contrast should not be romanticized: some private and parochial schools are also very inadequate in various ways. As is often pointed out, they can be selective in the pupils they accept, while public schools have to take the rest, which can turn them into a "dumping ground" for the slow learners, behavior disorders and miscellaneous rejects the private schools don't want. The solution, however, is not necessarily to reinforce the public-school monopoly by making it harder to enter the private-school arena unless a school is prepared to be a carbon copy of the public school.

The widespread and growing dissatisfaction with public schooling should at least make courts a bit less ready to equate the state's undoubted interest in the quality of education with the means usually—and uncritically—employed to achieve it, particularly when they are shown not to be very reliable or effective. The state need not show perfect success in every instance, but it ought to be required to show more than a merely "reasonable" choice of means to attain its compelling interest if those means are what impose the burden on the free exercise of religion—as is often the case. The private schools in these cases were not challenging the state's interest in education but the *means* employed to achieve it. The state should have to show why certification of teachers is the *only* effective way to ensure quality of education, not just that it isn't arbitrary or unreasonable, or that it is a "reliable indicator of the probability of success";—the material of which judicial notice earlier was taken suggests that it isn't.

There would seem to be several missing links between certification of teachers and quality of education. Would it not give a closer clue to the quality of education to examine the *product* rather than the transcripts documenting the *preparation* of the *producer*? (Arkansas instituted a statewide system for testing the *present* abilities of teachers—amid a chorus of outrage from the state teachers' association.[66]) Whatever shortcomings written examination of pupils may have as an indicator of classroom performance, it would seem to be closer in time to existing conditions than a threshold catalog of courses taken by the teacher prior to entrance into teaching, which for some senior teachers may have been many years ago. Even "continuing education" requirements for teachers are still a step away from the *product* of education—the performance of the pupils.

The Nebraska court's observation that testing comes too late to salvage the "term, semester or year," while true, is not a criticism that rises to the level entitled to weigh against free exercise claims. If necessary, test the pupils oftener! And it would not be a catastrophe if some of them did have to repeat a course for a better score. That has been known to happen in public schools—perhaps not as often as it should. But the Nebraska court's dictum was essentially a gratuitous objection offered by outsiders who may be more concerned with the "unfair" competition of private schools than

66. *N.Y.Times*, Mar. 25, 1985.

with not wasting pupils' time. In most instances where private school pupils have been given standardized tests, they have scored as well as, or better than, pupils in public schools, and that is the *really* objectionable situation that causes public educators to shy away from this most direct (and embarrassing) ascertainment of quality in education by testing the *product* of the process.

4. An Emerging Pattern: Home Schooling

A special case of private schooling encountering various forms of state regulation is to be found in the phenomenon of *home schooling*, in which parents, for religious reasons or for other reasons or for both, refuse to send their children to public schools *or* to state-approved private schools but tutor them at home. This pattern has been spreading across the country with legal support from the Home School Legal Defense Association of Paeonian Springs, Virginia, which defended the right of parents to teach their own children at home, whether the parents be fundamentalists or atheists or somewhere in between. Most states have some provision in their education laws for home schooling; the zone of turbulence arises around how much and what kind of regulation the state can exert over such schooling.

Two cases decided in the Supreme Court of Michigan on the same day on this subject will stand for the struggle over this issue and will suggest the current state of the law—or rather, the several states—at least with respect to a key concern: whether the state can require that home schooling be undertaken with state-certified teachers only, as the law of Michigan required. To some parents, such as the defendants in both these cases, that requirement was unacceptable. They proceeded to teach their children at home without complying with the statutory requirement and were duly convicted of violation of the compulsory attendance laws and fined accordingly. The only legal difference between the two cases was that in one (discussed first here) the defendants had not claimed a *religious* objection to the requirement, and in the other they had.[67]

a. *People v. Bennett* (1993). In this case the opinion of the court was delivered by Justice James H. Brickley.

> The issue before us is whether, in a challenge not involving religious convictions, a teacher certification requirement for home schools violates a parent's right to direct a child's education under the Fourteenth Amendment. The Bennetts, in challenging the requirements, are claiming that their Fourteenth Amendment right to direct the education of their children should be classified as a "fundamental right," thus making it impervious to the minimal scrutiny due process test.[68]...

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67. Their actual reasons for undertaking home schooling were equally religious, according to an attorney with the Home School Legal Association; they just followed different litigation strategies. (Telephone conversation with Scott Somerville, August 30, 1994.)

68. The *minimal* scrutiny due process test is whether the state has chosen a rational means to achieve a legitimate end within the competence of the state. At the other end of the spectrum is *strict*

> The crux of the defendants' convictions concerns their decision to withdraw their four children from public school. Dissatisfaction with the public school system was their stated reason for their action, not any religious belief. [They] believed that they could provide their children a better education than the local public school, even though neither... is a certified teacher.
>
> [They] enrolled their children in the home based education program (HBEP) sponsored by Clonlara, Inc., of Ann Arbor, Michigan. The HBEP provides parents with a home instruction program, and allows parents to utilize the services of certified teachers and classrooms on the Ann Arbor campus.... The children studied math, English, spelling, reading, writing, science, social studies, history and art.... At the end of the school year, standardized achievement test results indicated that three of the four children were either at or above their grade level.[69]
>
> Despite their attempts to teach their children at home, [the Bennetts] were convicted of failing to send their children to school in violation of Michigan's compulsory education laws.
>
> * * *
>
> Defendants argue that there is state and federal case law in support of their contention that, as parents, they have a fundamental right to direct their children's education.[70] We do not, however, find that the cited cases should be so interpreted. Indeed, we have not found and defendants have not presented *any* case that finds the existence of a Fourteenth Amendment fundamental right of parents to direct their children's secular education free of reasonable regulation. We conclude that parents *do not* have such a constitutional right requiring a strict scrutiny standard. On the contrary, the state may reasonably regulate education, including the imposition of teacher certification and curricula requirements on home-school programs, in order to advance the legitimate interest of compulsory education.[71]
>
> * * *
>
> The defendants' reliance on most of the cases cited[72] is misplaced because those cases deal with religious issues under the First Amendment. This case is specifically not about religion and must be so considered....

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scrutiny: whether the state is seeking to achieve a compelling interest by the least oppressive or burdensome means. That is essentially the difference between the two cases being discussed, and the court divided almost evenly over this issue.

69. The court noted in the margin that the fourth child had fallen below his grade level in public school, but was making steady progress toward his grade level during his year of schooling at home.

70. The court noted that a fundamental right has been defined as "having a value so essential to individual liberty in our society" that its alleged violation justifies the courts in reviewing the acts of other branches of government alleged to be responsible.

71. Emphasis in original.

72. Viz., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed at § 1b above; *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at § 2 above; *Meyer v. Nebraska*, 262 U.S. 390 (1923), discussed at §1a above; *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e.

> These cases, defendants are convinced, exemplify the United States Supreme Court's recognition of a Fourteenth Amendment fundamental right in parents to direct the education of their children.... They may teach their children on their own, defendants conclude, because if the Fourteenth Amendment allows them to direct their children's education, they ought to be able to provide that education themselves.
>
> Clearly the Supreme Court cases to which defendants refer do not support their contentions, [and neither do] the home-school cases[73].... The parents [in those cases] all taught their children at home because of religious convictions.... [N]either this Court nor any other court has held that parents have a fundamental right to direct their children's education under all circumstances. Rather, state interference with such rights deserves strict scrutiny only within the context of the First Amendment.
>
> Having found strict scrutiny unnecessary because of the absence of a fundamental right, the state's teacher certification requirement need only satisfy the minimal scrutiny test.... In general, it can be assumed that the state has an interest in seeing that all children within its borders are properly educated.... We also find that ensuring the minimum competence of those entrusted to teach to be, at the very least, a legitimate state interest. Under the... minimal scrutiny test, a state law prevails if it is in any way reasonably related to the state's interest.... Across the country, state and federal courts have upheld home-school regulations simply on the ground that they were reasonable state actions.[74]...
>
> In the case at bench, it was incumbent upon defendants to show the unreasonableness of the certification requirement, and they have been unable to do so.... We are convinced, therefore, that the requirement is not unreasonable. Teacher certification can measure, and to some extent ensure, the minimum qualifications of each teacher. Certification is, therefore, at least not an unreasonable way to further the state's interest.[75]

The majority, however, agreed with the defendants that they were entitled to a hearing before being prosecuted under the compulsory education law, so their conviction was vacated. Justice Dorothy Comstock Riley concurred in the vacating of the conviction but dissented as to the rest of the holding.

> The Bennetts' performance as teachers is not criticized by the state, only their failure to utilize certified instructors. Indeed, any state contention that the Bennetts inadequately instructed their children would be unwarranted because [they] appear to be at least as effectual educators as the local public school district. In fact, the majority recognizes that Jason's educational achievement was at least satisfactory, while Erika's and

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73. Viz., *Mazanec v. North Judson-San Pierre School Corp.*, 614 F.Supp. 1152 (N.D.Ind. 1985); *Ellis v. O'Hara*, 612 F.Supp. 379 (E.D.Mo. 1985); *Care and Protection of Charles*, 504 N.E.2d 592 (1987).

74. Citing *In re Sawyer*, 672 P.2d 1093 (1983); *In re Kilroy*, 467 N.Y.S.2d 318 (1983); *People v. Turner*, 263 P.2d 685 (1953); *Murphy v. Arkansas*, 852 F.2d 1039 (CA8 1988).

75. *People v. Bennett*, 501 N.W.2d 106 (Mich. 1993).

> Krista's were superior to their grade levels. The excellence of the Bennett's teaching, however, was most cogently demonstrated by the educational improvement of Scott: he had fallen below grade level in public school, but under his parents' instruction he steadily progressed and met the goals of his grade level. Nevertheless, the state prosecuted and convicted the Bennetts for failing to utilize certified teachers.
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> * * *
>
> The teacher certification requirement, as applied to the Bennett's home school, violates their constitutionally protected liberty to direct the education of their children because it is not reasonably related to education.
>
> * * *
>
> Michigan's teacher certification requirement is not reasonably related to educational achievement, but is merely an attempt to standardize its children by forcing students to accept instruction only from state-approved teachers.[76] Although the Court of Appeals found that "[t]he teacher certification requirement is a backbone in the protection of" state education, this contention is dubitable in the instant case. There is no dispute that the Bennett children are receiving an excellent education from their parents.... Moreover..., the nearly universal consensus of our sister states is to authorize home schools without teacher certification. In fact, even Michigan does not mandate that all students be taught by certified teachers.[77] Furthermore, the state failed to provide any evidence proving a correlation between the teacher certification requirement and educational achievement, while the Bennetts have proven that their children have been adequately educated without certified teachers.... [M]andatory teacher certification in this home school is simply irrelevant to educational achievement....
>
> Although the state possesses a legitimate interest in ensuring the adequate education of the Bennett children, it has failed to support the proposition that the certification requirement is reasonably related to that interest. Indeed, forcing the Bennetts to halt the education of their children merely "spites [the state's] own articulated goals."[78] Instead, the teacher certification requirement attempts to standardize the education of the Bennett children to state-imposed dictates in derogation of parents' constitutional rights.[79]

The majority had replied in its opinion to this criticism by pointing out that under minimal scrutiny the burden is not on the state to show the reasonableness of its

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76. Paraphrasing *Pierce v. Society of Sisters*, *supra*, at 534-5: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

77. Citing *People v. DeJonge*, 501 N.W.2d 127 (1993), the case immediately following this one in the reports of the Michigan Supreme Court, discussed immediately below.

78. Quoting *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

79. *People v. Bennett, supra*, Riley dissent.

means chosen to achieve legitimate ends, so if the state thought teacher certification was necessary, the court would not require it to prove its contention.

b. *People v. DeJonge* (1993). A very different result was reached in the other home schooling case reported next in the Michigan Supreme Court's docket. This time the majority opinion was delivered by Justice Riley, joined by Chief Justice Michael F. Cavanagh and Justice Robert P. Griffin. The "swing vote" that made it a majority was that of Justice Charles L. Levin, who noted his agreement with part of the Riley opinion. In this case, a couple named DeJonge taught their two children at home, using a program administered by the Church of Christian Liberty and Academy of Arlington Heights, Illinois. The DeJonges followed this course because they wanted to provide a "Christ centered education" for their children, and to "show them how to face God, not just how to face the world." The trial judge stated that he was "very impressed with the... very, very favorable report on the education of the children," and that he had no "question about the [religious] conviction or the sincerity of the DeJonges on this position." Nevertheless, they were convicted of instructing their children without state certified teachers, each fined $200, required to test their children and to arrange for certified instruction.

The opinion by Justice Riley began with an impressive tribute to religious liberty, the text being exceeded in length by appropriate quotations from the Founders.

> At issue then is whether Michigan's teacher certification requirement for home schools violates the Free Exercise Clause of the First Amendment....
>
> This American experiment[80] includes an unprecedented protection of religious liberty from tyrannical government action. Springing forth from this nation's founding principle that government is "instituted for [the] protection of the rights of mankind," the Free Exercise Clause ensured protection from government interference as the first freedom in the Bill of Rights.[81]
>
> The prominence of religious liberty's protection in the Bill of Rights is no historical anomaly, but the consequence of America's vigorous clashes regarding religious freedom. The First Amendment's protection of religious liberty was born from the fires of persecution, forged by the minds of the Founding Fathers, and tempered in the struggle for freedom in America.[82]
>
> As our history forcefully attests, the Founding Fathers envisioned the protection of the free exercise of religion as an affirmative duty of the government mandated by the inherent nature of religious liberty, not one

80. Footnote: Referred to by the Founding Fathers as *novus ordo seclorum*, a new order for the ages.

81. The quotation is from Gouverneur Morris, 2 *Records of the Federal Convention of 1787* 222. Note 17 adds: The Founding Fathers proclaimed that "extending to its citizens all the blessings of civil & religious liberty" is the "great end" and the "object of our government." Charles Pinckney, 4 *Records of the Federal Convention of 1787* 28-29.

82. Citing, "for an exhaustive examination of prerevolutionary religious persecution, as well as the development of religious freedom in the colonies," McConnell, Michael, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L.R.* 1409 (1990).

of mere "toleration" by government. Most significant in this history was the dramatic confrontation regarding the proposed renewal of Virginia's tax levy for the support of the established church. This embroilment bore James Madison's Memorial and Remonstrance Against Religious Assessments, delivered in the Virginia House of Burgess [*sic*] in opposition to the levy, as well as Thomas Jefferson's Virginia Bill of Religious Liberty, enacted in the levy's stead. Madison's Memorial and Remonstrance... explained as "a fundamental and undeniable truth" that religious liberty is a deeply private, fundamental, and inalienable right by which a citizen's religious beliefs and practices are shielded from the hostile intolerance of society, while Jefferson's Bill... protected the right of the free exercise of religion, as well as barred state established churches. The Founders understood that this zealous protection of religious liberty was essential to the "preservation of a free government."... Indeed, Jefferson proclaimed that "[n]o provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[83]

In *Employment Div. Dep't of Human Resources v. Smith*,[84] the Court ruled that the "Free Exercise Clause in conjunction with other constitutional protections, such as... the rights of parents, acknowledged in *Pierce [v. Society of Sisters]*... to direct the education of their children..." demands the application of strict scrutiny. Hence, Michigan's teacher certification requirement must undergo strict scrutiny to survive a free exercise challenge. This strict scrutiny is manifested in the "compelling interest" test, which is composed of five elements:

(1) whether a defendant's belief, or conduct motivated by belief, is sincerely held;

(2) whether a defendant's belief, or conduct motivated by belief, is religious in nature;

(3) whether a state regulation imposes a burden on the exercise of such belief or conduct;

(4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct;

(5) whether there is a less obtrusive form of regulation available to the state.[85]

The first element of the compelling interest test is met by the DeJonges because their belief is sincerely held.... As noted, after extensive trial testimony, the trial judge concluded [that they were sincere]. Furthermore, the state does not contest the sincerity of the DeJonges' beliefs.

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83. Jefferson, "Reply to Address to the Society of the Methodist Episcopal Church at New London, Connecticut, February 4, 1809" *The Complete Jefferson* (New York: Duell, Sloan & Pearce, 1943), p. 544.

84. 494 U.S. 872 (1990), discussed at IVD2e.

85. Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at § B2, *supra* and *Dep't of Social Services v. Emmanuel Baptist Preschool*, 455 N.W.2d 1 (Mich. 1990), Cavanagh, J., concurring, Griffin, J., concurring.

Similarly, because the DeJonges' belief is religiously based, the second element of the compelling interest test is met.... Because the DeJonges' faith professes "that parents are the ones that are responsible to God for the education of their children," they passionately believe that utilizing a state-certified teacher is sinful. Their faith, although unusual, may not be challenged or ignored.

The third element of the test is also met because the certification requirement clearly imposes a burden on the exercise of the DeJonges' religious freedom.... The certification requirement imposes upon the DeJonges a loathsome dilemma: they must either violate the law of God to abide by the law of man, or commit a crime under the law of man to remain faithful to God.... [T]he state's enforcement of the teacher certification requirement compels the DeJonges to sin, as they have been coerced by the state to educate their children in direct violation of their religious faith.... Indeed, perhaps the most striking state burden upon religious liberty imaginable, criminal prosecution, was imposed upon the DeJonges for following their interpretation of the word of God.

[T]he certification requirement is unconstitutional because it fails to meet the remaining two prongs of the compelling interest test.... [S]trict scrutiny demands that (1) a state regulation be justified by a compelling state interest, and (2) the means chosen be essential to further that interest.[86]

Furthermore, a compelling state interest must be truly compelling, threatening the safety or welfare of the state in a clear and present manner.

The state asserts that it has a compelling state interest in ensuring the adequate education of all children.... The importance of compulsory education has been recognized.... Nevertheless, our rights are meaningless if they do not permit an individual to challenge and be free from those abridgments of liberty that are otherwise vital to society.... Hence, Michigan's interest in compulsory education is not absolute and must yield to the constitutional liberties protected by the First Amendment. The United States Supreme Court explained:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children".... "[W]e must searchingly examine the interests that the State seeks to promote... and the impediment of those objectives that would flow from recognizing the claimed [religious] objection."[87]

Indeed, such a searching examination in the instant case is enlightening because it reveals that the state has focused upon the incorrect governmental interest. The state's interest is not ensuring that the goals of

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86. This represents a slight departure from the earlier characterization of the final prong, "whether there is a less obtrusive form of regulation available to the state."

87. Quoting *Yoder*, *supra*, at 214, 221.

compulsory education are met, because the state does not contest that the DeJonges are succeeding at fulfilling such aims. Rather, the state's interest is simply the certification requirement of the private school act, not the general objectives of compulsory education. The interest the state pursues is the manner of education, not its goals.

Hence, the state's narrow interest in maintaining the certification requirement must be weighed against the DeJonges' fundamental right of the free exercise of religion. Because exemptions are the remedy provided in cases in which a general law abridges religious liberty, this Court must focus on the effect granting such religious exemptions would have on the purported state interest. If this Court does not find a substantial effect on the asserted interest, an exemption is warranted because no compelling interest is affected. In the case at issue, if the state fails to prove that exemptions from the teacher certification requirement impair the state's asserted interest, then no balancing is necessary. The state, therefore, must establish that enforcing the certification requirement, without exception, is essential to insure the education required by the compulsory education law. If less intrusive means fulfill the government's purported interest, then an exemption must be granted and the alternative implemented.

Nevertheless, the state in the instant case has failed to provide evidence or testimony that supports the argument that the certification requirement is essential to the preservation of the asserted interest. Conversely, while the record is barren of evidence supporting the state's claim, it clearly indicates that the DeJonge children are receiving more than an adequate education: they are fulfilling the academic and socialization goals of compulsory education without certified teachers or the state's interference. Nor has the state suggested that the DeJonges have jeopardized the health or safety of their children, or have a potential for significant social burdens. In sum, the state has failed to provide one scintilla of evidence that the DeJonge children have suffered for the want of certified teachers; it has failed to prove a "clear and present" or "grave and immediate" danger to the welfare of the children that justifies the onerous burden placed upon the DeJonges' exercise of their religious beliefs.

Furthermore, the experience of our sister states provides irrefutable evidence that the certification requirement is not an interest worthy of being deemed "compelling." The nearly universal consensus of our sister states is to permit home schooling without demanding teacher certified instruction.[88] Indeed, many states have recently rejected the archaic notion that certified instruction is necessary for home schools. Within the last

88. Footnote 49: Besides Michigan, only two states, California and Alabama, appear to mandate teacher certification in home schools.... Although Kansas bars the usual home school, *In re Sawyer*, 672 P.2d 1093 (1983), it permits private, denominational, and parochial instruction by "competent" instructors.

decade, over twenty states have repealed teacher certification requirements for home schools.[89]

The relevance of the practice of our sister states becomes clear when empirical studies disprove a positive correlation between teacher certification and quality education. A study by Dr. Brian Ray of the National Home Education Research Institute found that "there was no [statistically significant] difference in students' total reading, total math, or total language scores based on the teacher certification status (i.e., neither parent had been certified, one had been, or both had been) of their parents."[90] The compelling nature of the teacher certification requirement is not extant.

In any event, even if the state possessed a compelling state interest, it has failed to prove that the certification requirement is essential to that interest.[91]... [T]he state's sweeping assertion must be turned aside when it is not supported by evidence.... To find that of all the states in the Union only Michigan meets the aims of compulsory education is untenable and flies in the face of the aforementioned studies....

Indeed, the State of Michigan itself now permits noncertified teachers possessing a bachelor's degree to teach in nonpublic schools, nor is the certification requirement enforced with regard to substitute teachers in public schools.[92] Even Michigan, then, does not command a certification requirement for the great majority of its students, but only for those taught by their parents at home.

The state, however, argues that the proposed alternative means are more intrusive upon the religious beliefs of the DeJonges than the current certification requirement. We, however, do not presume to make that judgment. We believe that the DeJonges are the best judges of which regulations are the most burdensome or least intrusive upon their religion. To entertain the notion that either this Court or the state has the insight to interpret the DeJonges' religion more correctly than they is simply "an arrogant pretension."[93]...

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89. Citing, Devins, "Fundamentalist Christian Educators v. State: An Inevitable Compromise," 60 *Geo. Wash. L. Rev.* 818 (1992). (This article was originally a paper commissioned by this author for presentation at the Bicentennial Conference on the Religion Clauses at the University of Pennsylvania School of Law in 1991 and published in a symposium issue by the George Washington Law Center.)

90. National Home Education Research Institute, *A Nationwide Study of Home Education: Family Characteristics, Legal Matters, and Student Achievement* (Salem, Ore., 1990), p. 12.

91. In the margin, the court noted that "the DeJonges propose that individualized standardized achievement testing is an adequate device that the state may utilize to monitor the education of their children. The state's attempt to discredit the viability of that option is unpersuasive."

92. Here the court noted in the margin that the *Detroit News* for December 12, 1989, announced under the headline DETROIT SCHOOLS SHORT 151 TEACHERS that a public school administrator had admitted that most of the open teaching positions in the system were filled with noncertified teachers.

93. Quoting Madison's *Memorial and Remonstrance*, quoted in *Everson v. Bd. of Ed.*, 330 U.S. 1, appendix to Rutledge opinion at 67.

> Furthermore, the Court of Appeals erroneously placed the burden of proof upon the DeJonges. The Court of Appeals, by requiring that the individual burdened by governmental regulation prove that alternatives exist, while at the same time accepting at face value unsubstantiated assertions by the state, has turned constitutional jurisprudence on its head. Our citizens need not "propose an alternative" to be afforded their constitutional liberties. We are persuaded that the burden of proof correctly placed in the instant case is fatal to the state's certification requirement....
>
> We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore, are exempt from the dictates of the teacher certification requirement. Accordingly, we reverse the DeJonge conviction.[94]

Chief Justice Cavanagh and Justice Griffin joined this opinion. Justice Levin wrote separately: "I join in the reversal of the convictions because I agree with the majority that the state failed to discharge its burden of showing that the teacher certification requirement is the least intrusive means of discharging its interest in the education of the DeJonge children." Thus a majority of four justices of the seven-justice court held that the certification requirement was unconstitutional because it failed the least-intrusive-means test, but only three justices believed that it also failed the compelling-state-interest test.

The three other justices took an opposite view in an opinion delivered by Justice Conrad L. Mallett, Jr., for himself and Justices James H. Brickley and Patricia J.Boyle.

> Once a compelling interest is clearly established, the majority would require the state to prove that the teacher certification requirement is the least restrictive means of regulation. We disagree. In *United States v. Lee*[95] the Court departed from the "least restrictive means" requirement. After concluding that the government's interest in assuring mandatory and continuous participation in the social security system is "very high," the Court stated that the "remaining inquiry is whether accommodating the Amish will *unduly interfere* with fulfillment of the governmental interest." Although the Court declined to further define "undue interference," surely it is a less burdensome standard than the "least restrictive means" requirement. Thus, in the present case, this Court should inquire whether accommodation of the DeJonges' beliefs would unduly interfere with the fulfillment of the state's interest in education.
>
> The majority would apparently further require the regulation to be the least restrictive when compared to the other forty-nine states.

94. *People v. DeJonge*, 501 N.W.2d 127 (1993).
95. 455 U.S. 252 (1982), discussed at IVA9b.

Undoubtedly, we can survey similar regulations utilized in our sister states in order to determine the relative obtrusiveness of our requirements. Yet, the mere existence of less restrictive regulation in other states tells us little about that state's success at achieving the compelling interest in universal education. Indeed, some states may have quality objectives that differ from those of Michigan. Regardless, we do not believe it is necessary for the state to establish that the certification requirement is the least restrictive means of achieving its compelling interest in education.

The majority would also require the state [to] prove that "the means chosen be essential to further th[e] interest." We disagree. In equal protection cases involving race discrimination, the regulation in question is presumed invalid and the court employs strict scrutiny, in which the court asks if the state has a compelling interest and if the means chosen are essential to further the interest. However, for purposes of the Free Exercise Clause, this equal protection inquiry is not a part of the compelling interest test adopted by this Court. Unlike the equal protection inquiry, there is no presumption of invalidity and the claimant bears the initial burden. By imposing such a substantial burden on the state, the majority's compelling interest test is specifically designed to cause the state to fail.

Applying the compelling interest test to the present case, we reach several conclusions different from those of the majority.... The majority concludes that "the state's interest is simply the certification requirement of the private school act, not the general objectives of compulsory eduction. The interest the state pursues is the manner of education, not its goals." We disagree.

We believe that the state possesses a compelling interest in education.... The certification requirement is an effective means, chosen by the state to achieve its interest in the education of school-age children. In fact, the certification requirement ensures that educators possess a minimal level of competency before they may take on the task of preparing our children for their future endeavors.... Furthermore, although correctly observing that the Court may not recharacterize the defendants' beliefs, the majority offers no support for what is actually the crux of its argument—that is, that this Court has the authority to recharacterize the nature of the state's interest as the "manner of education." Nor, of course, is there any support in decisions from the United States Supreme Court for the even more remarkable proposition that the state's interest is not "in ensuring that the goals of compulsory education are met, because the state does not contest that the DeJonges are succeeding in fulfilling such aims." To conclude that the state is without authority to protect all children within its boundaries unless it can prove that a given parent is not satisfying the state's interest is to radically alter the relationship between the Legislature and the Court. Such a result, it might be noted, would assuredly offend the Founding Fathers.

The majority would require the state to prove that its compelling interest is "truly compelling, threatening the safety or welfare of the state in a clear or present manner." However, such a requirement is untenable....

> Simply because the [Supreme] Court in *Sherbert [v. Verner]* used this ["clear and present manner"] language to categorize those decisions in which state regulation was upheld, it does not necessarily follow that in all cases thereafter a threat to the safety or welfare of the state is required in order for a free exercise challenge to be rejected. Most importantly, this Court has not expressly adopted a "clear and present manner" requirement in association with the compelling interest test, and such an extension is unwarranted here.
>
> Finally, this Court must inquire whether accommodating the DeJonges' religious beliefs would unduly interfere with fulfillment of the state's interest in education.... The Legislature charged the State Board of Education with the duty of determining the requirements and issuing all licenses and certificates for teachers. The majority asserts that Michigan "does not command a certification requirement for the great majority of its students, but only for those taught by their parents at home." We disagree.... [T]he certification requirement is not "absolute." Subject to the availability of a certified teacher, a local school board may engage a noncertified instructor to teach computer science, a foreign language, mathematics, biology, chemistry, engineering, physics, or robotics to students in grades nine through twelve. The noncertified teacher must possess a bachelor's degree, major in or possess a graduate degree in the field of specialization to be taught, and have two years of occupational experience in the field to be taught. If the instructor intends to teach for more than one year, then the instructor must pass a basic skills examination and a subject area examination. Thus, the certification requirement has not been abandoned for the majority of students, and the Legislature has added an element of flexibility to the requirement in order to attract qualified individuals to teach high school students specialized fields of study....
>
> The requirements under these exceptions, while not particularly stringent, operate as the minimum qualifications a person must possess in order to teach. Any attempt to further reduce these minimum qualifications, or to allow parents without them nonetheless to teach their children, will increase the possibility that students will not be properly taught and thus not properly learn as much as they should, thereby causing the state to fail to achieve its compelling interest to educate....
>
> We have... determined that the state possesses a compelling interest in the universal education of its children and that the certification requirement is an effective means of achieving this interest. Further, accommodation of the DeJonges' religious beliefs would unduly interfere with the state's fulfillment of its interest in education. Accordingly, the DeJonges' convictions and the Court of Appeals decision should be affirmed.[96]

96. *People v. DeJonge, supra*, dissent, emphasis in original.

The dissent took an unexpected turn in its final pages. When it began to examine the contention that uncertified teachers were being allowed to teach in public schools, it sounded as though it was going to show that the exceptions were few and carefully restricted, so that the system as a whole was carefully regulated to require certification in virtually all instances. As it went on, however, the exceptions seemed to loom larger and larger until they almost swallowed the rule, whereupon the dissent concluded rather lamely that no *further* exceptions could be allowed—such as home schoolers—without causing the whole structure to collapse.

In this give-and-take between the two groups of Michigan justices can be seen the differences of viewpoint that characterized much of the discussion of the accommodation of religious convictions in the realm of education. The majority in *Bennett* and the minority in *DeJonge* were not inclined to consider religious nonconformists as a very weighty problem and thought the state well within its rights to go on its way undisturbed by eccentrics, especially if they were not even religious eccentrics. Even if they were religious, the state's way was not to be impeded by exempting them. The *DeJonge* dissent reproached the majority for loading the dice against the state and insisted that the plaintiffs should have the uphill course. The other wing of the court, led by Justice Riley, was equally insistent—in spite of the recently announced weakening of the Free Exercise Clause in *Oregon v. Smith*—that the compelling interest test was not only still in effect (since this was deemed a "hybrid" case, combining free exercise claims with parental rights in education, as required by *Smith*), but that the state interest must really be *compelling*. Both sides announced their views a bit imperiously considering the narrow margin by which they prevailed. In any event, the home schooling movement rolled on, gathering adherents across the nation, its future legal prospects hard to predict from the Michigan exchange.

5. A Curious Federal Case: *Unitarian Church West v. McConnell* (1972)

From Wisconsin in 1972 came a unique case in which a church was confronted with the possibility of criminal penalties for carrying on part of its religious education program. The church was the Unitarian Church West of Brookfield, Wisconsin. The trouble arose as follows:

> The Church has announced that it intends to offer, as part of its Sunday school, a course about sex entitled "About Your Sexuality." This course was developed under the auspices of the Unitarian Universalist Association, the parent body of the Church. The course is being sponsored by the members of the church in order to give their children, what they believe to be, a necessary and better education in sex than they could get elsewhere. The course, forty hours in length may include still pictures of heterosexual and homosexual acts. The showing of the pictures will constitute less than one-half hour of the course.

> The proposed course has been carefully developed by professionals and twenty-five Unitarian churches around the country. After looking into the program and participating in a number of orientation sessions, the local Church decided to participate in the program and selected John Doe and Mary Doe to teach the course. The Does have received extensive special training in order to teach this course.
>
> Plaintiffs [the Church] allege that sex is so intertwined with moral, ethical, and theological values that it constitutes an integral part of the ethical basis of a Unitarian. They further allege that "About Your Sexuality" was developed and will be presented because other available sex education programs, e.g., the public schools, fail to present sex in a context in which religious and ethical values are paramount. This failure has prompted them to prepare a course which they feel will provide Unitarian children with a proper ethical basis for future attitudes toward sexual behavior by providing the children with an understanding that sex is but one aspect of the personal relations between individuals in our society and not a matter isolated from ethical and moral considerations....
>
> Participation in the course is to be limited to children of the congregation who have the consent of at least one parent who has attended a parent orientation session wherein the course is explained, including all pictures used.[97]

The district attorney of Waukesha County, one Richard B. McConnell, got wind of the course from a feature article in the Milwaukee *Journal* and from "several complaints concerning your forthcoming sex education program for children." He wrote the Rev. Robert C.A. Moore, pastor of the church, a letter asking for a meeting and adding, "I must admonish you that should you proceed with this program without first establishing `ground rules' with this office, prosecution could result." As a result of this letter, the church board met twice in special session and decided to comply with the district attorney's request for a meeting, which was held in his office January 7, 1972.

> The district attorney requested (1) to see the course material, (2) the context in which it would be used, (3) the background of the teachers, and (4) whether any objectionable sexual conduct was going to be encouraged. In addition, the district attorney stated that the course might be a violation of Wisconsin's obscenity laws, and that if his requests were not complied with, then the Church proceeded at its own peril and would be subject to prosecution should he later conclude that the course constituted a criminal violation.

The Church went into federal court under the civil rights act that provides a civil action for deprivation of rights by anyone acting "under color of" state law.[98] Chief

97. *Unitarian Church West v. McConnell*, 337 F. Supp. 1252 (1972).
98. 42 U.S.C. § 1983.

Judge Reynolds ruled on the motion for a preliminary injunction after discussing freedom of religion and speech and the right of parents to educate their children.

> The plaintiffs swear in their affidavits that "About Your Sexuality" is a part of their religious exercise. The district attorney does not dispute this. He argues, however, that *as he understands* Unitarianism, sex education is not intertwined with the "basic" tenets of the religion, and that therefore it is improper to view this case as dealing, in a constitutional sense, with religious practice. This position is without merit. The protection the Constitution extends to the exercise of religion does not turn on the theological importance of the disputed activity. Rather constitutional protection is triggered by the fact that it is religious....
>
> The Constitution guarantees protection from state interference in the exercise of religious beliefs except when such exercise presents a substantial threat to public safety, peace, or order. Only when such a threat is presented may it be said that there is a countervailing state interest of overriding significance which is so compelling as to justify state interference with religious liberty.... The question then before me today is whether the disputed sex education course poses such a substantial threat to the public that the state has the compelling interest of overriding significance necessary to interfere with plaintiff's religious liberty.
>
> Defendant's position is that "About Your Sexuality" may constitute a violation of the obscenity law. Under the law as it is now interpreted, the state has a rational interest in preventing obscenity. Roth v. United States (1957). However, it is equally clear that this rational interest does not empower the state to interfere with protected constitutional rights to stamp out obscenity. United States v. Reidel (1971)[99]
>
> * * *
>
> I find that in all probability it will ultimately be found that... the state's interest in preventing obscenity is neither compelling or overriding in light of plaintiffs' right to free exercise of religion.
>
> **Protected Parental Right**. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. `It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder!' Ginsberg v. New York.... [In] Ginsberg v. New York... the [Supreme Court] upheld a statute regulating the distribution of obscenity to minors only after stating:
>
> "*** the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[100]
>
> In this case parents wish to educate their children in the facts of life within a proper ethical, moral, and religious context before they learn

99. Citations for the obscenity cases are: *Roth*, 354 U.S. 476, *Reidel*, 402 U.S. 351.

100. *New York v. Ginsberg*, 390 U.S. 629 (1968).

> about such facts *sans* such context in the public schools or from the street. I find that there is a substantial likelihood that the district attorney's interest... lacks either a compelling quality or overriding significance in light of the parental right and duty to educate their children.
>
> **Freedom of Speech**.... Considering "About Your Sexuality" as a whole..., and assuming the nude photographs to be of the worst type, and in light of the facts set forth above, I find that:
>
> 1. The plaintiffs will in all probability ultimately prevail in demonstrating that the course taken as a whole is neither intended to nor will it produce a prurient interest, i.e., "a shameful or morbid interest in nudity, sex, or excretion,..."[101] in the minds of the students....
>
> 2. In any case there is a strong probability that the social value in "About Your Sexuality" overwhelms any alleged negative factors.
>
> Accordingly, I find that there is a strong likelihood that "About Your Sexuality" will be found not to be obscene and therefore protected speech under the First Amendment....
>
> In effect... what happened was that the district attorney, in an effort to establish a [censorship] procedure, which may well be in violation of the Constitution,... chilled the exercise of three of the most fundamental rights an American citizen possesses. That he succeeded is all too clear, for in point of fact the plaintiffs have delayed their Sunday school program out of fear of prosecution. This alone constitutes irreparable harm.
>
> * * *
>
> It is therefore ordered that pending a final determination of this action, the defendants are enjoined from prosecuting plaintiffs or interfering with them in any way for any activities related to the presentation of the sex education course "About Your Sexuality" on the basis that said course is obscene.[102]

How did the case turn out on remand? That will never be known because an election intervened, Mr. McConnell was not returned to the office of district attorney, and his successor apparently did not see in the pictures of sexual activity proposed to be shown at Unitarian Church West a threat to the community sufficient to justify further prosecution.

101 . Quoting *Roth, supra.*

102 . *Unitarian Church West, supra.*