THE STATE AND SECTARIAN EDUCATION: REGULATION TO DEREGULATION

The past decade has witnessed a nationwide resurgence of the century-old fundamentalist religious movement.[1] In reaction to what it sees as the nation's declining morality, the movement has abandoned political neutrality for alliance with a nationally powerful conservative political force, the "New Right."[2] Many of the issues that this new coalition addresses ultimately focus on the proper relationship between government and church.[3] The direction of proposed change is unclear, however, as the movement exhorts putting "God back in government,"[4] yet also advocates increased separation of church and state in

---

THE FOLLOWING CITATIONS WILL BE USED IN THIS COMMENT:

Brief for Defendants, Hinton v. Kentucky State Bd. of Educ., No. 88314 (Franklin Cir. Ct., Ky. Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980), hereinafter cited as Brief for Defendants, *Hinton*;

Brief for Plaintiffs, Hinton v. Kentucky State Bd. of Educ., No. 88314 (Franklin Cir. Ct., Ky. Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980), hereinafter cited as Brief for Plaintiffs, *Hinton*;

Brief for Defendants, State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979), hereinafter cited as Brief for Defendants, *Columbus Christian Academy*.

1. Fundamentalism began in the late 1800s as a conservative religious response to liberal church trends. Its tenets are the inerrancy of the Bible, substitutionary blood atonement, the deity and virgin birth of Jesus, and Christ's bodily resurrection and second coming. Christensen, *Fundamentalists challenge evolution, liberal doctrine*, News and Observer (Raleigh, N.C.), Nov. 4, 1979, § I, at 9, col. 2. This Comment does not attempt to analyze the fundamentalist movement, but only to sketch the religious and political setting in which the controversy over state regulation of sectarian schools has occurred. For a modern survey of the movement, see A. PIEPKORN, IV PROFILES IN BELIEF: EVANGELICAL, FUNDAMENTALIST, AND OTHER CHRISTIAN BODIES (1979).

2. The "New Right" has strategically courted this alliance with Christian leaders who share its convictions on such issues as abortion, the Equal Rights Amendment, homosexuality, sex education and prayer in schools, pornography, and national defense. Benson, *'Bible Right' to take liberals to task*, News and Observer (Raleigh, N.C.), Oct. 21, 1979, § I, at 2, col. 2. *See* Campbell, *Ministry not without controversy*, News and Observer (Raleigh, N.C.), Nov. 4, 1979, § I, at 8, col. 1; May, *Political message is clear, fundamentalist leaders say*, News and Observer (Raleigh, N.C.), Nov. 4, 1979, § I, at 1, col. 1. According to one of its architects, Howard Phillips, the coalition's strategy is to establish a "lead" church in every congressional district, with the pastor "monitoring the performance of the incumbent congressman." Benson, *supra*.

3. For descriptions of the movement's goals in North Carolina, see Christensen, *Fundamentalists target education*, News and Observer (Raleigh, N.C.), Nov. 5, 1979, at 1, col. 1; May, *supra* note 2.

4. Editorial, *Danger ahead for preachers in politics*, News and Observer (Raleigh, N.C.), Oct. 21, 1979, § IV, at 4, col. 3.

opposition to state regulation and taxation of particular church-conducted activities.[5]

The debate over the church-state controversy has been most intense in the context of education.[6] Fundamentalists nationwide have opposed attempts to premise the tax-exempt status of private schools on proof of racial integration,[7] and are challenging requirements that sectarian schools pay unemployment insurance tax on their employees.[8] They support tax relief for parents who send their children to private schools, and are organizing to monitor the textbooks, curricula, and activities of public schools for "anti-Christian influence."[9] In some states, fundamentalists and other conservative religious groups have challenged state health and safety regulations for child care facilities, as well as state regulations imposing educational content, teacher qualification, and student competency standards upon church-operated schools.[10]

The constitutionality of some aspects of state regulation of sectarian schools remains unsettled. Since 1975, suits by conservative religious groups in Ohio and Kentucky have succeeded in exempting private schools from compliance with many state-imposed educational requirements.[11] In contrast, a North Carolina trial court upheld most state regulations, as applied to private schools, against claims that they infringed upon constitutionally protected rights.[12] In response to an intense religious lobby, however, the North Carolina legislature effec-

5. The fundamentalists argue, for example, that separation of church and state precludes state regulation of sectarian schools and the imposition of unemployment insurance tax for teachers employed in such schools. *See* Christensen, *supra* note 3.

6. This emphasis corresponds with the increased number of churches now operating schools as substitutes for public education. Since 1961 the number of "Christian academics" has increased nationally from 1,400 to 15,000, and church leaders recently counted 175 court cases in 26 states involving the government and fundamentalist schools. Christensen, *supra* note 3.

7. *See, e.g.*, Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978).

8. Christensen, *supra* note 3.

9. *Id.*

10. *See* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980); State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated as premature appeal from an interlocutory order*, 261 S.E.2d 908 (N.C. 1980); State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); Roloff Evangelistic Enterprises v. State, 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978).

11. *See* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (decided on state constitutional grounds), *cert. denied*, 100 S. Ct. 2158 (1980); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

12. State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

tively "deregulated"[13] such schools by enacting two related statutes only days before the state supreme court was to hear the appeal, thereby mooting the lower court decision.[14]

This Comment examines the constitutional boundaries within which a state may regulate sectarian and other private schools in order to further legitimate educational objectives. Under the guidelines of free exercise analysis, it discusses religious objections to *any* state regulatory authority over sectarian schools and, in addition, discusses opposition to specific aspects of regulation. State as well as federal considerations are noted, illustrated by the cases from Ohio,[15] Kentucky,[16] and North Carolina.[17] The discussion then turns to the implications of legislative *de*regulation of sectarian education, using recent North Carolina legislation as an example. The Comment examines educational policy concerns and indicates state constitutional considerations before exploring in depth the potential infirmities of deregulation

13. "Deregulation" in this context refers to the legislative removal of substantive educational requirements previously used by the state to regulate nonpublic schools.

14. The legislation, An Act to Create an Article to Deal Specifically with Private Church Schools of Religious Charter, and An Act to Create an Article to Deal with Certain Qualified Nonpublic Schools, ch. 505-06, 1979 N.C. Sess. Laws 529 (codified at N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979)), was enacted May 1, 1979. On May 4, 1979, the North Carolina Supreme Court remanded the case to the superior court for an order vacating the judgment and dismissing the action.

15. State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). The defendants, twelve parents of school-aged children, appealed their conviction of failure to send their children to schools complying with standards prescribed by the state, alleging that the regulations violated their free exercise rights and other constitutionally protected liberties. *Id.* at 182, 192-93, 351 N.E. 2d at 752, 757-58.

16. Hinton v. Kentucky State Bd. of Educ., No. 88314 (Franklin Cir. Ct., Ky. Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980). Thirty-six individuals, five Christian schools, and one association of Christian schools brought this action seeking a declaration that Kentucky's minimum requirements for approval of sectarian schools were unconstitutional. Brief for Defendants, *Hinton*, at 3. A state Board of Education directive for school districts to initiate legal proceedings against parents with children enrolled in nonpublic schools not approved by the state prompted the action against the state. *Id.*; Brief for Plaintiffs, *Hinton*, at 5.

17. State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979). The state filed the action against eleven sectarian schools, seeking both a declaration of its rights to regulate nonpublic, sectarian schools and an injunction prohibiting the schools from violating the statutes and regulations. The controversy arose when the defendant schools refused to complete all or part of the annual report forms required by the state for regulation, denying the state's authority to regulate them and asserting infringement of their religious beliefs. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 1, 7-8.

For discussions focusing on the individual Kentucky trial court and Ohio decisions, see Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education*, 67 KY. L.J. 415 (1978-79); Comment, *Separation of Church and State: Education and Religion in Kentucky*, 6 N. KY. L. REV. 125 (1979); 37 OHIO ST. L.J. 899 (1976).

under the establishment clause. Throughout, this Comment urges the carefully-reasoned location of Thomas Jefferson's metaphorical wall of church-state separation[18] as education's best protection in the growing conflict between church factions and the state.

I. THE FREE EXERCISE CLAIM[19]

A. *Background—Early Recognition of Parental Rights.*

Two United States Supreme Court opinions of the 1920s, both written by Justice McReynolds, firmly established the constitutional right of parents to direct the education of their children.[20] As one of the liberties protected by the fourteenth amendment to the United States Constitution, this parental right could not be abridged by "legislative action which [was] arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[21] In *Meyer v. Nebraska*[22] the Court held unconstitutional a state statute that made teaching any subject in a language other than English to a child who had not successfully completed the eighth grade a misdemeanor. The Court determined that no danger from foreign language instruction was sufficient to justify this interference with the acquisition of knowledge and with parental rights and duties.[23] In *Pierce v. Society of*

18. Thomas Jefferson's characterization of the religion clause, which occurred in response to an address by a committee of the Danbury Baptist Association, is quoted in note 44 *infra*.

19. There is some dispute among trial courts as to whether state regulatory schemes that fail to exclude religious groups might also be challenged under the establishment clause of the first amendment. In Kentucky a trial court held that state's regulation of sectarian education violative of both the free exercise and establishment clauses of the United States Constitution, and of the Kentucky Constitution's protection of religion. Hinton v. Kentucky State Bd. of Educ., No. 88314, slip op. at 11-12 (Franklin Cir. Ct., Ky. Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980). The state supreme court, however, held the regulations invalid on unique state constitutional grounds and did not reach the federal questions. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980). For a discussion of the controversy regarding proper use of an establishment clause argument, see Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 424-25, 263 S.E.2d 726, 741 (1980).

In the context of education, establishment clause issues have generally arisen in one of two settings: where sectarian schools have benefited directly or indirectly from state financial support, or where religious influence has shaped public school activities or instruction. For examples of cases in these categories, see notes 213-14 *infra*. Restrictive state regulation of religious activity, when that regulation is not incident to the provision of some benefit upon religion, is more appropriately subject to free exercise analysis. *De*regulation of sectarian education, however, may raise establishment clause issues. See text accompanying notes 201-50 *infra*.

20. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

21. Meyer v. Nebraska, 262 U.S. at 400; *see* Pierce v. Society of Sisters, 268 U.S. at 535.

22. 262 U.S. 390 (1923).

23. The Court appreciated the legislature's desire "to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters," particularly

Sisters[24] the Court held that an Oregon statute violated fourteenth amendment rights by providing for a fine or imprisonment, with limited exceptions, for parents or guardians who failed to send children aged eight to sixteen to public schools. In both cases, however, the Court made it clear that the restrictions it imposed on state action were limited to the particular abuses challenged in those cases; the decisions implied no restriction on state power to regulate reasonably all schools in order to foster an educated citizenry.[25] Further limitations upon this state power were left for future determination.

Litigants continue to assert infringement upon the parental right to direct the upbringing and education of a child as a basis for opposition to state regulation of private education.[26] Since 1940, however, they have frequently supplemented their challenges with claims of infringement of their first amendment right to free exercise of religion.[27] A claimant asserting a free exercise claim must show the "coercive effect of the enactment as it operates against him in the practice of his religion."[28] Although a practice or belief need not be religiously orthodox or institutionalized to receive the protection of the free exercise clause,[29] it must be rooted in religious beliefs as opposed to secular

---

in light of the recent world war, but also recognized that "a desirable end cannot be promoted by prohibited means." *Id.* at 401-02.

24. 268 U.S. 510 (1925).

25. *See id.* at 534; Meyer v. Nebraska, 262 U.S. at 400-02.

26. *See* Notes & Comments, *Parental Rights: Educational Alternatives and Curriculum Control*, 36 WASH. & LEE L. REV. 277 (1979). For a recent case discussing the limits of parental and privacy rights in the context of private nonsectarian education—in which free exercise rights were not involved—see Runyon v. McCrary, 427 U.S. 160 (1976) (prohibition, under 42 U.S.C. § 1981 (1976), against racial discrimination in admissions by private nonsectarian schools did not violate constitutioually protected parental rights, privacy rights, or rights of free association).

27. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court stated explicitly for the first time that the first amendment's protection of freedom of religion applies to the states through the fourteenth amendment: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* at 303. In *Cantwell* a statute prohibited solicitation for religious, charitable, or philanthropic causes without prior state approval. The Court held that the law violated the free exercise clause of the first amendment, as applied to the states through the fourteenth amendment.

Numerous cases since *Cantwell* have reaffirmed this position in a variety of contexts. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), in which the Court held unconstitutional, under the establishment clause, state-imposed regulations requiring daily Bible readings or prayers in public schools.

28. School Dist. of Abington Township v. Schempp, 374 U.S. at 223.

29. Follett v. Town of McCormick, 321 U.S. 573, 577 (1944) (the Court accepted the contention of a Jehovah's Witness minister that he was preaching the gospel by distributing religious literature door to door and was thus entitled to first amendment protection); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313-14 (5th Cir. 1977) (the religious beliefs of an individual need not be institutionalized for constitutional protection, but when the action of an institution is chal-

philosophical or personal beliefs.[30] Even if these requirements are met, however, state regulation may nevertheless be constitutionally permissible if the state interest is "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[31]

Fundamentalists in Kentucky and North Carolina, in their recent challenges to state regulation of sectarian schools, asserted free exercise claims on two different levels. First, they opposed—in general terms—any state regulation of their schools; second, they claimed that individual regulations, especially those concerning teachers, textbooks, and curricula, restricted the exercise of their religious beliefs.[32]

B. *The Authority to Regulate—State Interest in Sectarian Education.*

In describing their faith to the Kentucky and North Carolina trial courts in *Hinton v. Kentucky State Board of Education* and *State v. Columbus Christian Academy*, the fundamentalists expressed their belief in:

> 1. The schools' role as an integral part of the churches [in] carrying out the religious mission of the latter.
> 2. The pervasively religious nature of the church schools; the involvement of all curriculum, learning materials, teaching and activities in a unitary religious mission.
>
> . . . .
>
> 10. Adherence, for Biblical reasons, to the principle of separation of church and state.
>
> . . . .
>
> 12. The consequent necessity to reject accreditation, or licensing, by the State, or *anything that would manifest State power over a mission ordained by God*.[33]

The litigants characterized the states' power of approval, which they

---

lenged, the beliefs the institution adopts or promulgates, rather than those of its members, become the basis for its protection), *cert. denied*, 434 U.S. 1063 (1978).

30. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (The Court found that Amish opposition to education beyond the eighth grade and their separatist, agrarian way of life reflected deep religious convictions).

31. *Id.* at 214. See text accompanying notes 44-50 *infra* for a more detailed discussion of this balancing test.

32. Brief for Defendants, *Columbus Christian Academy*, at 21-22; Brief for Plaintiffs, *Hinton*, at 21-22.

33. Brief for Defendants, *Columbus Christian Academy*, at 20-21; Brief for Plaintiffs, *Hinton*, at 20-21 (emphasis added). William Bentley Ball of Harrisburg, Pennsylvania, represented the fundamentalist schools in both cases, along with local counsel; the fundamentalists' beliefs are described identically in both briefs. Ball also represented the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972).

In Ohio, the third state with recent litigation on the issue, the authority of the state reasonably to regulate sectarian schools was not challenged. State v. Whisner, 47 Ohio St. 2d 181, 197, 351 N.E.2d 750, 760 (1976). See note 36 *infra*.

refused to accept, as a "life-or-death power over the schools. . . . [and the] church's teaching ministry as realized in its school."[34] They denied the existence of any compelling state interest to justify such a power, arguing that in neither state was there "evidence of any outbreak . . . of bad education by private schools."[35]

Arguments of such broad sweep fail for several reasons.[36] First, litigants are usually unable to prove that the mere existence of state regulatory power operates coercively to restrict the free exercise of religious beliefs.[37] In *Columbus Christian Academy*, for example, the North Carolina trial court found that "[f]undamentalist Christianity does not prohibit participation in, or obedience to, a regulatory scheme" that requires state approval of nonpublic schools on the basis of specified minimum standards.[38] As the free exercise claim was unsupported, the court upheld the state's regulatory power over the church-operated schools.[39] Similarly, in *Roloff Evangelistic Enterprises v. State*[40] the operator of three child care homes in Texas contested the authority of the state, under the Child Care Licensing Act, to establish minimum health and safety standards for child care facilities and to assure compliance with the standards by a program of inspection and licensing.[41] In his trial testimony the Reverend Lester Roloff, who op-

34. Brief for Defendants, *Columbus Christian Academy*, at 22; Brief for Plaintiffs, *Hinton*, at 22.

35. Brief for Defendants, *Columbus Christian Academy*, at 24-25; Brief for Plaintiffs, *Hinton*, at 25-26.

36. In State v. Whisner, 47 Ohio St. 2d 181, 197, 351 N.E.2d 750, 760 (1976), the court quickly dispensed with any questions about the state's authority to impose reasonable regulations for the approval of private schools: "Numerous decisions of the Supreme Court of the United States over the years have clearly sounded the death knell with respect to any such assertion."

37. The Supreme Court articulated the requirement of a coercive, restrictive effect in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963). While sectarian schools might claim that such an effect results from state regulation, the past actions of the schools may belie the seriousness of the allegation. For example, in North Carolina the defendant schools in operation prior to the year of litigation had previously received state approval, and many had advertised and were continuing to advertise themselves as "State-approved." State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 10, 13 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

38. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 12. See note 94 *infra* for the text of the North Carolina legislation authorizing such a regulatory scheme.

39. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 12, 21. The court carefully limited the criteria for state approval or rejection of nonpublic schools, however, to those areas held to be legitimate subjects of regulation (teacher certification and curriculum, as related only to the required minimum course of study; length of school day and year; and statutory health measures). Amendment to Judgment (Sept. 4, 1978), State v. Columbus Christian Academy, No. 78 CVS 1678.

40. 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978).

41. The Child Care Licensing Act provided:

> (b) It is the legislative intent to protect the health, safety, and well-being of the children of the state who reside in child care facilities. Toward that end, it is the purpose

erated the homes, attributed his authority exclusively to the Bible and denied any coexisting authority in the state to "control the Christian upbringing of children in a ministry such as the Enterprises."[42] Despite these assertions, the court held that the state's licensing authority over the homes did not conflict with the beliefs of Roloff Evangelistic Enterprises or restrict the exercise of its beliefs.[43]

Furthermore, even if submission to state regulatory authority over private education should infringe upon free exercise rights in a particular case, the state would not necessarily be precluded from acting. The Supreme Court has repeatedly endorsed Thomas Jefferson's assessment that legislation may shape men's actions but not their opinions.[44] Inter-

---

of this Act to establish statewide minimum standards for the safety and protection of children in child care facilities, to insure maintenance of these standards, and to regulate such conditions in such facilities through a program of licensing. It shall be the policy of the state to insure proteetion of children under care in child care facilities, and to encourage and assist in the improvement of child care programs. It is the further legislative intent that the freedom of religion of all citizens shall be inviolate. Nothing in this Act shall give any governmental agency jurisdietion or authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of any religious instruction or the curriculum of a school sponsored by a church or religious organization.

Ch. 708, § 1(b), 1975 Tex. Gen. Laws 2240 (repealed 1979). The Act authorized the State Department of Public Welfare to promulgate reasonable rules, regulations, and minimum standards to effectuate its purpose.

42. Roloff Evangelistic Enterprises v. State, 556 S.W.2d at 857.

43. *Id.* at 858-59.

Similarly, a North Carolina court upheld a statute providing for the licensing of day-care facilities that meet state health and safety standards in State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated as premature appeal from an interlocutory order*, 261 S.E.2d 908 (N.C. 1980). The court noted that the church-operated facility had neither contended nor shown that seeking a state license was contrary to any sincerely held religious belief, and held that the Act referred only to the physical condition of a facility and not to a church's ministry. 42 N.C. App. at 671-72, 258 S.E.2d at 464. The Act in question provides for a commission with the following powers and duties:

(1) To develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article.
(2) To approve the issuance of licenses for day-care facilities based upon inspections . . . and written reports.
. . . .
(5) To make rules and regulations and develop policies for implementation of this Article, including procedures for application, approval, renewal and revocation of licenses.
. . . .
(7) To develop and promulgate standards which reflect higher levels of day care than required by the standards established by this Article, which will recognize better physical facilities, more qualified personnel, and higher quality programs.

N.C. GEN. STAT. § 110-88 (1978). The stated purpose of the Act is to protect the "physical safety and moral environment" of those children under the care of such facilities. *Id.* § 110-85.

44. In *Reynolds v. United States* the Supreme Court quoted Jefferson's description of the proper relationship between religion and government under the first amendment:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that *the legislative powers of the government reach actions only, and not opinions*,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exer-

preting the first amendment in *Reynolds v. United States*,[45] the Court explained:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.
>
> . . . .
>
> . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?[46]

In short, the religious protection of the first amendment has two separate features, as reflected in a frequently quoted passage from *Cantwell v. Connecticut*:

> [T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.[47]

---

cise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*

98 U.S. 145, 164 (1878) (emphasis added).

45. *Id.*

46. *Id.* at 164, 166. The Court then applied this understanding in upholding the conviction of a Mormon under a federal anti-polygamy statute against a defense that he had acted in conformity with religious duty:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id. at 166-67.

47. 310 U.S. 296, 303-04 (1940); *see, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions").

From its inception, the first amendment has provoked conflict between religion, as it seeks expression in action, and government, in its pursuit of an ordered society. The likelihood of conflict enlarges as the state, seeking to manage and protect an increasingly complex society, intrudes more and more into areas of religious concern. As Justice Frankfurter stated in a separate opinion in McGowan v. Maryland:

> By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. . . . However, this freedom [of religion] does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes,

There is, therefore, no inherent right to carry out a religious mission free of any governmental interference or regulation. Infringement of first amendment rights may be constitutionally permissible when there is a compelling state interest[48] in an area within the health, safety, or general welfare power of the state.[49] "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . .' "[50]

Courts have consistently recognized the states' compelling interest in assuring that their citizens are educated for participation in society.[51]

---

and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

366 U.S. 420, 461-62 (1961) (upholding the constitutionality of Sunday closing laws).

48. Sherbert v. Verner, 374 U.S. 398, 406 (1963). In determining the constitutionality of denying unemployment benefits to a claimant discharged from employment because her religious beliefs prevented her from working on Saturdays, the Court considered "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right." *Id.*

49. Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972). If the federal government, rather than a state, infringes first amendment rights, the regulation must be an exercise of its delegated powers. *Id.*

50. Sherbert v. Verner, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). When litigants assert only their parental—not religious—rights in opposition to state regulation, courts show more deference to the state interest. As the court stated in Wisconsin v. Yoder, 406 U.S. at 215, "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 . . . ." In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court upheld a claim of infringement of parental rights, only because the legislation bore "no reasonable relation to some purpose within the competency of the state." *Id.* at 535. Nevertheless, some lower courts have described parental rights as among those fundamental rights that may not be restricted absent a compelling state interest. *See, e.g.*, Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974). *But see* Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974). The confusion concerning the appropriate standard for a claim based solely on parental, rather than religious, rights to direct the educational upbringing of a child is discussed in Notes & Comments, *supra* note 26.

51. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 463 (1973) (recognizing a "State's special interest in elevating the quality of education in both public and private schools"); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (acknowledging the Supreme Court's "abiding respect for the vital role of education in a free society" and agreeing with the lower court that " 'the grave significance of education both to the individual and to our society' cannot be doubted"); Board of Educ. v. Allen, 392 U.S. 236, 247 (1968) (as evidence that parochial schools perform a secular educational function, Justice White noted that many American parents, who consider "high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create," rely on such schools); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (stating that "[t]he American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted," and citing the declaration of the Ordinance of 1787 that "[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged").

Chief Justice Warren emphasized the significance of education in *Brown v. Board of Education*:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[52]

It should not be necessary to first prove an "outbreak . . . of bad education"[53] to assert such a compelling interest. A state is not required to await an epidemic of smallpox before requiring vaccination;[54] the consequences of poor education, like disease, are significant enough to permit state action to prevent the first occurrence.

Numerous Supreme Court opinions have recognized or implied the constitutionality of reasonable regulation[55] of private schools to promote this state interest.[56] Justice White, writing for the majority in *Board of Education v. Allen*,[57] summarized these cases: "[I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."[58] The state may insist therefore that "attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."[59]

---

52. 347 U.S. 483, 493 (1954).

53. See note 35 *supra* and accompanying text.

54. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1904).

55. Insertion of the word "reasonable" implies that the nature of the regulations, as well as the general power to regulate, must be examined. This second level of inquiry is discussed in the text accompanying notes 62-164 *infra*.

56. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court held that a state lacked power to restrict access to private education, but carefully noted that

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

Id. at 534. The Court had expressed a similar caution in Meyer v. Nebraska, 262 U.S. 390 (1923), in which it invalidated a state statute prohibiting foreign language instruction in private schools but added that the "power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned." *Id.* at 402.

57. 392 U.S. 236 (1968) (a statute requiring local school boards to purchase and lend textbooks, free of charge, to students in public schools or private schools complying with the state's compulsory education law is not an establishment of religion).

58. *Id.* at 247.

59. *Id.* at 245-46. The Court recently reiterated this position in Runyon v. McCrary, 427 U.S. 160 (1976), but in the context of racial discrimination rather than free exercise infringement:

In summary, few religious groups could show that their faith precludes their church-operated schools from complying with any state regulation at all. Moreover, the state has a compelling interest in furthering an educated citizenry and has the right, by virtue of its police power, to pursue that interest through appropriate regulation of private schools. Neither the state interest, nor the religious interest, if shown, presumptively prevails over the other. The Supreme Court has adopted a balancing test to analyze such conflicts, weighing the interest of the state against the interference with free exercise rights.[60] Standing alone, the conceptual opposition of fundamentalists or others to state authority over what they consider a religious mission is likely to be

---

> [I]t does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education. . . . [W]hile parents have a constitutional right to send their children to private schools and . . . to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Id. at 178. *Accord*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There 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"); McGowan v. Maryland, 366 U.S. 420, 467 (1961) (Frankfurter, J., concurring) (dictum) ("parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State"); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (dictum) ("parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) ("the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country' ") (quoting Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

60. *See* Wisconsin v. Yoder, 406 U.S. 205, 214, 233-34 (1972):

> 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 . . . .
>
> [On the other hand,] the power of a parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

This balancing test seems to have replaced or refined tests announced in earlier cases. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), for example, in which a Jehovah's Witness challenged a public school requirement that students salute the flag, the Court had held that "freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. The next year, in Prince v. Massachusetts, 321 U.S. 158, 167-69 (1944), the Court, while retaining the clear and present danger test, broadened the concept of danger because children were involved. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court defined the test somewhat differently: " 'Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). While the notions of immediate danger and grave abuse are no longer discussed in the cases, they may still have some bearing on whether a state's interest is compelling.

insufficient to override a state's interest in furthering its legitimate and compelling educational objectives through reasonable regulation.[61]

C. *The Means of Regulation—Limits on State Power.*

It is not enough, however, for a state to show that its interest in an educated citizenry overrides religious groups' general opposition to state regulatory authority over sectarian schools. The state must also justify its interest in each specific regulation or standard imposed under this authority that infringes upon free exercise. In other words, the state must justify the means by which it has chosen to regulate sectarian schools, as well as justifying its general power to regulate.

1. Yoder *as a Guideline.* Chief Justice Burger's landmark opinion in *Wisconsin v. Yoder*[62] offers the best example of this analysis in the context of education. Old Order Amish parents contested the constitutionality of Wisconsin's compulsory school attendance law, which they had violated by refusing to send their children to school beyond the eighth grade.[63] The Supreme Court examined the beliefs and lifestyle of Old Order Amish communities, which are "characterized by a

61. Although the Supreme Court has not squarely addressed this issue, dicta and holdings in related cases leave little doubt about the outcome. See the examples in note 59 *supra.*

In State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated as premature appeal of an interlocutory order*, 261 S.E.2d 908 (N.C. 1980), while noting that the school had not contended that seeking a state license was contrary to its religious beliefs, the court nevertheless examined whether the state could condition a church's performance of a major part of its ministry on receipt of a state license. The court held the state's interest in protecting the health and safety of children in day-care facilities to be compelling and upheld the licensing provision against the school's objections. 42 N.C. App. at 672, 258 S.E.2d at 463. It is unclear, however, whether the court weighed the two interests or determined only that there was no infringement of free exercise rights.

62. 406 U.S. 205 (1972).

63. *Id.* at 207. The trial court had determined that the law, which required school attendance of children until age 16, restricted the practice of sincere Amish religious beliefs, but upheld the law as a " 'reasonable and constitutional' exercise of governmental power." *Id.* at 213 (quoting the trial court). The Wisconsin Supreme Court reversed the decision, however, holding that the state had failed to establish an interest sufficient to override the free exercise rights at stake. *Id.*

The Amish, before *Yoder*, had made similar claims in other state courts for exemption from compulsory school attendance laws after the eighth grade. *See, e.g.*, State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966) (requiring school attendance beyond the eighth grade did not infringe upon the right to worship or believe, because how long a child should attend school is not a religious question; parents may send their children to private schools that meet state requirements), *appeal dismissed*, 389 U.S. 51 (1967); State *ex rel.* Chalfin v. Glick, 172 Ohio St. 249, 175 N.E.2d 68 (1961) (an injunction was not the proper remedy, absent statutory authority, to prohibit Amish parents from operating a private school which did not meet state standards when injury to society had not been shown); Commonwealth v. Beiler, 168 Pa. Super. Ct. 426, 79 A.2d 134 (1951) (the state does not interfere with religious liberty by requiring that children be educated in the subjects and within the age limits prescribed by law). See also State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955), in which members of the Old Order Amish faith instructed their

fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence."[64] The Amish asserted that formal education beyond the elementary level exposed their children to worldly pressures during the crucial period when the Amish child must adopt the Amish faith and accept the obligations of the lifestyle it imposes.[65] The Wisconsin statute therefore forced these Amish to choose between criminal punishment, relocation in a more tolerant state, or the assimilation of their children into society at large in contravention of their faith.[66]

To justify this severe impediment to the free exercise of Amish beliefs, the state asserted its compelling interest in educating all children for self-sufficient citizenship and for intelligent participation in the political system.[67] The state, arguing that Amish children should not be left ill-equipped for life or be allowed to become burdens upon society in the event they should leave the Amish community, emphasized the children's right to a secondary education and the state's power as *parens patriae*.[68]

In weighing these conflicting interests, the Court was strongly influenced by the centuries-old faith of the Amish, their consistent adherence to a philosophy of separation from worldly influence, and their proven self-sufficiency. The Amish children attended school through the eighth grade and subsequently received informal but effective educational preparation for their adult roles through participation in the work of the community.[69] The state presented no evidence that the

children of first through eighth grade age in a private school which failed to meet state requirements. The court held that

> [n]o question of religious freedom is presented in this case. By requiring the defendant to provide for the proper education of his children, his right to worship according to the dictates of his conscience is in no way abridged, and his right to instruct his children in the tenet of his chosen faith is unquestioned.

Id. at 192, 144 N.E.2d at 697.

64. 406 U.S. 205, 210 (1972). The Amish reject wordly pressures for academic accomplishment, material success, and social acceptance in favor of a simple lifestyle in harmony with nature and the soil. Their non-competitive, agrarian lifestyle, closely regulated by church rules, has remained fundamentally the same for centuries despite the pressures of a changing and modernizing society. *Id.* The Amish do not object to compulsory elementary education or to all forms of education beyond the eighth grade; they do, however, oppose the conventional higher education provided by state-certified high schools. *Id.* at 212, 223. Unlike the fundamentalists in the recent cases, the Amish accepted the general authority of the state to regulate the education of their children, but objected to one aspect of regulation.

65. *Id.* at 211-12.

66. *Id.* at 218-19. Several other states have established vocational training programs for the Amish as an alternative means of satisfying compulsory education laws. *Id.* at 208 n.3.

67. *Id.* at 221.

68. *Id.* at 224, 229.

69. *Id.* at 223-24.

community experienced attrition or that members who did leave would become burdens upon society because of their educational limitations. Nor did the state suggest that the children themselves wished to attend traditional high schools.[70] The Court therefore held that any additional benefit from another year or two of formal training was insufficient to justify the resulting impairment to the exercise of the Amish faith.[71] Without evidence of harm to the health of the child or danger to the public safety, peace, order, or welfare, the state's intervention as *parens patriae*—in disregard of parental wishes—was inappropriate.[72]

Wisconsin v. Yoder protected the right of the Amish to preserve their unique community by removing their children from conventional schools after the eighth grade. Chief Justice Burger expressly left Wisconsin free, however, to promulgate reasonable standards for regulating the content of the alternative, vocationally-oriented education provided within the Amish community.[73] Recognition of the legitimacy of that alternative education carried one step further the general philosophy previously articulated in *Pierce v. Society of Sisters*:

> [This nation's] fundamental theory of liberty . . . 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.[74]

In contrast with *Yoder*, the schools in *Pierce* had complied with the educational standards set by the state; "the Court held simply that while a State may posit such standards, it may not pre-empt the educa-

---

70. *Id.* at 224-25, 231.

71. The Court summarized the considerations leading to its holding as follows:

> 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 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 vocational education in terms of precisely those overall interests that the State advances in support of its program of 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 on 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.

Id. at 235-36.

72. *Id.* at 229-30.

73. *Id.* at 236. See note 66 *supra*.

74. 268 U.S. 510, 535 (1925).

tional process by requiring children to attend public schools."[75] In *Yoder*, Chief Justice Burger characterized the moral and religious training given by Amish parents as among the "additional obligations" referred to in *Pierce*.[76] The Amish, however, were actually substituting their moral, religious, and vocational training for the more conventional post-eighth grade education the state required. In effect, therefore, Chief Justice Burger exempted the Amish from compliance with state standards, rather than allowing them to supplement such standards. Other religious groups are not likely to win this concession, however, and parents will not be allowed to "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."[77]

2. *Protection of Educational Diversity.* If the substance of *Pierce* and the role of private schools in providing legitimate diversity of educational philosophy and approach[78] are to be preserved, private education must not be so regulated as to destroy it as an educational alternative. In *Farrington v. Tokushige*,[79] the Supreme Court held unconstitutional a statute which sought, by extensive educational regulation, to promote the "Americanism" of pupils attending foreign language schools in the territory of Hawaii.[80] These schools provided instruction as a supplement, rather than as an alternative, to compulsory public or approved private education.[81] The legislation empowered the territorial government to prescribe the schools' courses of study, entrance and attendance qualifications, and textbooks; to require their teachers to satisfy certain standards; to limit their hours of operation and the pupils who might attend them; to freely inspect their materials, facilities, and teaching; and to collect fees, issue permits, and require reporting to insure compliance.[82] The Court found that the regulations, when presented and examined as a whole rather than individually,

> [gave] affirmative direction concerning the intimate and essential details of such schools . . . . Enforcement of the Act probably would destroy most, if not all, of them; and, certainly, it would deprive par-

75. Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring).

76. *Id.* at 233.

77. *Id.* at 239 (White, J., concurring).

78. For discussion of the educational pluralism that private schools foster, see Bright v. Isenbarger, 314 F. Supp. 1382, 1391-92 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

79. 273 U.S. 284 (1927).

80. *Id.* at 293.

81. *Id.* at 291. The Court did not question the territory's requirement that alternative private education be equivalent to that of public schools.

82. *Id.* at 291-96.

> ents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions . . . .[83]

This respect for diversity is also reflected in the more general requirement that legislation be narrowly drawn to impose the least possible burden when fundamental rights are at stake.[84] Less burdensome alternatives need not be substituted, however, if they would fall short of effectuating overriding state interests.[85] After holding regulations affecting private schools unconstitutional on state grounds, the Kentucky Supreme Court in *Kentucky State Board for Elementary and Secondary Education v. Rudasill* stated that "[i]f the legislature wishes to monitor the work of private and parochial schools in accomplishing the constitutional purpose of compulsory education, it may do so by an appropriate standardized achievement testing program."[86] Similarly, the North Carolina legislature, having removed virtually all state regulations from private schools, required that such schools administer annually a standardized test to children in specified grades.[87] This ill-fitted substitute for state-imposed educational standards, although arguably less burdensome, is not constitutionally required. The state objective is not merely to identify for possible treatment those students for whom the educational system has failed; rather, it is to promote the likelihood that the system will provide every child with the basic education necessary to function effectively in society. The fundamentalists in Kentucky argued that the state should be content to "taste the pudding . . .

---

83. *Id.* at 298. The Court stated: "Apparently [the regulations] are parts of a deliberate plan to bring foreign language schools under a strict governmental control . . . ." *Id.*

84. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973); Roe v. Wade, 410 U.S. 113, 115 (1973) ("Where certain 'fundamental rights' are involved, the Court has held . . . that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake"); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("the power to regulate [religious conduct] must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom").

85. *See* McGowan v. Maryland, 366 U.S. 420, 450-51 (1961), in which the state did not have to substitute legislation requiring citizens to rest any one day in seven for a Sunday closing law (even though this would be less burdensome on certain religious groups), because the state's purpose was not only to provide workers with periodic respite but to set aside a *common* day for rest, recreation, and tranquility among families and friends.

86. 589 S.W.2d 877, 884 (Ky. 1979). The court indicated that the Commonwealth could close those schools for which test results showed a failure "to reasonably accomplish the constitutional purpose," *id.*, but gave no indication of how such a standard was to be determined.

87. N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979). The substitution is particularly ineffective in North Carolina because the private schools there are free to select their own tests and establish their own minimum scores, and poor student performance triggers no state action. Letter from Edwin M. Speas, Jr., N.C. Special Deputy Attorney General, to J. Frank Yeager, Superintendent of Durham (N.C.) County Schools (Oct. 1, 1979).

without fussing so much about the recipe."[88] To continue with the analogy, however, tasting the pudding to determine mistakes in the recipe will do nothing to correct the pudding already made; even a creative cook is willing to work from a basic recipe.[89]

3. *Particular Areas of Regulation. Wisconsin v. Yoder* stands as an exception to the deference the Supreme Court generally accords traditional state regulation of education.[90] Although the exception is narrow and closely tied to the facts of the case, it has been pressed as an opening through which other religious groups might also be exempted from regulation.[91] Since *Yoder*, the related tests and guidelines developed above, as well as applicable state protections, have been applied by the courts of Ohio, Kentucky, and North Carolina to various aspects of regulation.[92]

(a) *Course of Study.* Instruction in certain basic subjects is considered necessary to effectuate the state's general interest in producing a self-sufficient citizenry able to participate effectively and intelligently in

88. Brief for Defendants, *Hinton*, at 20.

89. A more detailed argument against the substitution of standardized testing is presented in Comment, *Regulation of Fundamentalist Christian Schools, supra* note 17, at 427-29.

90. See note 59 *supra* and accompanying text.

91. Reliance on *Yoder* may be misplaced, however, for the exemption from traditional education accorded the Amish in *Yoder* did not prohibit Wisconsin from regulating their alternative education. See text accompanying note 73 *supra*.

92. The Ohio, Kentucky, and North Carolina cases suggest some of the limits upon state authority in the most common areas of regulation. The discussion in the text does not, however, focus in detail upon the particular situation in any one state. For more detail concerning the Ohio and Kentucky litigation, see the authorities cited in note 17 *supra*.

The constitutionality of state regulation of sectarian education was discussed in other state cases prior to *Yoder*. In some, the courts found that the regulations did not infringe upon free exercise rights. *See* Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962), *appeal dismissed*, 372 U.S. 705 (1963) (requirement that teachers in private schools meet state qualifications was not arbitrary or unreasonable and did not infringe upon religious freedom); *In re* Currence, 42 Misc. 2d 418, 248 N.Y.S.2d 251 (Fam. Ct. 1963) (the state did not violate the constitutional guarantee of freedom of religion by not excusing a child from public school one day a week for religious observances); Commonwealth v. Bey, 166 Pa. Super. Ct. 136, 70 A.2d 693 (1950) (the state's refusal to excuse a child from school attendance on Fridays for religious reasons did not infringe upon the religious freedom of parents who chose to send their children to public schools). The right of parents to provide alternative schooling for their children for religious reasons was upheld in Wright v. State, 21 Okla. Crim. 430, 209 P. 179 (1922), since the instruction was adequate and no standards had been statutorily prescribed.

For other discussions by state courts of the state's right to regulate private education, absent any issue of freedom of religion, see State v. Will, 99 Kan. 167, 160 P. 1025 (1916); Sante Fe Community School v. New Mexico State Bd. of Educ., 85 N.M. 783, 518 P.2d 272 (1974); Packer Collegiate Inst. v. University of N.Y., 273 App. Div. 203, 76 N.Y.S.2d 499, *rev'd on other grounds*, 298 N.Y. 184, 81 N.E.2d 80 (1948); State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976); Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

the political system.[93] Pursuant to statutory directives,[94] the boards of education of the three states had prescribed certain subjects to be included in the curricula for various grade levels in both private and public schools.[95] In none of the states did private schools challenging the regulations oppose providing instruction in the "basic branches of edu-

93. *See* Wisconsin v. Yoder, 406 U.S. at 221. In *West Virginia State Bd. of Educ. v. Barnette*, the Court stated, "[T]he State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.'" 319 U.S. 624, 631 (dictum) (quoting Stone, J., dissenting, in Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940)).

94. Kentucky law exempts from the compulsory public school attendance requirement those students who are "enrolled and in regular attendance in a private or parochial regular day school approved by the state board of education," KY. REV. STAT. ANN. § 159.030(b) (Baldwin 1977), and empowers the board to adopt rules and regulations for approving such schools, *id.* § 156.160(8). A further provision requires that "[p]rivate and parochial schools shall be taught in the English language and shall offer instruction in the several branches of study required to be taught in the public schools," and that "the term of the school shall not be for a shorter period in each year than the term of the public school" in the district where the child lives. *Id.* § 158.080.

North Carolina legislation requires that

> Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session.
>
> . . . The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

N.C. GEN. STAT. § 115-166 (Supp. 1979). Section 115-255 provides further that

> The State Board of Education . . . shall always protect the right of every parent to have his children attend a nonpublic school by regulating and supervising all nonpublic schools . . . to the end that all children shall become citizens who possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship. . . . [S]uch nonpublic school shall meet the State minimum standards as prescribed in the course of study, and the children therein shall be taught the branches of education which are taught to children of corresponding age and grade in the public schools and such instruction, except courses in foreign languages, shall be given in the English language.

Id. § 115-255 (1978). These statutory provisions relating to nonpublic schools in North Carolina have since been superseded by N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979).

Ohio law at the time of *Whisner* empowered the state board of education as follows:

> (D) It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community . . . .
>
> In the formulation and administration of such standards for nontax supported schools the board shall also consider the particular needs, methods, and objectives of said schools, provided they do not conflict with the provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.

OHIO REV. CODE ANN. § 3301.07 (Page 1972) (amended 1975, 1976, and 1977).

95. Kentucky curriculum requirements were established by 704 KAR 3:305 (1979) and by the Kentucky standards for grading, classifying, and accrediting elementary, middle, and secondary schools as prepared by the Kentucky State Board for Elementary and Secondary Education and

cation," but they did challenge the states' authority to require units of study or allotment of time for those branches of study.[96]

The Kentucky Supreme Court in *Rudasill* upheld the constitutionality of the statutory requirement that private schools "offer instruction in the several branches of study required to be taught in the public schools,"[97] provided, however, that those branches are "rationally related to the education of children to exercise their right of suffrage and to participate in the democratic system."[98] The court recognized that "such basic studies as reading, writing, spelling, grammar, history, mathematics and civics are so related," and noted that other subjects might also bear such a rational relationship.[99]

In *State v. Columbus Christian Academy*[100] the North Carolina trial court upheld a statute and regulations prescribing basic subjects of study, even though certain numbers of units were required for specified subjects in grades nine through twelve.[101] The holding did not reflect a balancing of interests, however, because the court concluded that a required minimum course of study did not violate any constitutionally protected rights of the litigants.[102] In the opinion of the court, "[c]ompliance with State regulations has not hindered the defendants

incorporated by reference in 704 KAR 10:022 (1979). See discussion at text accompanying notes 117-18 *infra*.

North Carolina regulations concerning curriculum and graduation requirements, 16 NCAC 2C.0703(d)(1)-(3), are set forth at note 101 *infra*.

Pertinent Ohio legislation (OHIO REV. CODE ANN. § 3313.60 (Page 1972) (amended 1975, 1978)) and regulations (EDb-401-02(G)) are reprinted in State v. Whisner, 47 Ohio St. 2d 181, 201, 206 n.6, 351 N.E.2d 750, 762, 765 n.6 (1976).

96. Regulation of curriculum in terms of allotted time or number of units devoted to particular subjects is discussed in the text accompanying notes 106-123 *infra*.

97. KY. REV. STAT. ANN. § 158.080 (Baldwin 1977).

98. 589 S.W.2d at 883.

99. *Id.*, n.10.

100. No. 78 CVS 1678 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

101. The regulations required that instruction in each of the first eight grades include "language arts (reading, English, spelling, writing), mathematics, social studies including Americanism, science, health and physical education, art, music, and such other subjects as required by the General Statutes." The curriculum for grades nine through twelve collectively had to present: "(A) english: four units; (B) mathematics: one unit; (C) science (including biology): two units; (D) social studies (including United States history): two units; (E) physical and health education: one unit." Furthermore, graduation from a nonpublic school required at least the same number of "units" as required for graduation from a public high school. 16 NCAC 2C.0703(d)(1)-(3), *reprinted in* State v. Columbus Christian Academy. No. 78 CVS 1678, slip op. at 17-18.

The North Carolina legislature subsequently exempted private schools from these regulations, see note 14 *supra*; the North Carolina Supreme Court never reviewed the lower court decision.

102. No. 78 CVS 1678, slip op. at 21.

in the presentation of religious instruction in their schools or disturbed the practice of their religion."[103]

Although Ohio legislation prescribed a comprehensive educational curriculum,[104] the court in *State v. Whisner* did not consider that provision alone to be an unconstitutional burden upon the free exercise of religion.[105] When coupled, however, with extensive instructional time provisions, the requirements overstepped the boundary of reasonable regulation of the course of study.

(b) *Instructional time.* Justice White's recognition in the majority opinion of *Board of Education v. Allen*[106] of state authority to provide for minimum hours of private school instruction[107] was accompanied by an implied qualification. Kentucky and North Carolina legislation prohibiting private schools from operating on a term shorter than that of public schools,[108] and North Carolina regulations setting minimum hours for the school day and for daily teacher presence,[109] were all upheld by the respective state courts without serious question.[110] Ohio, however, went much further in regulating instructional time. State law required a minimum of five hours of school attendance for elementary children,[111] and the challenged regulations allocated all of that time to the required secular subjects of instruction.[112] The court held that such thoroughgoing regulation, which left no time in the traditional school day for religious instruction, unduly burdened the free exercise of religious beliefs within church-operated schools established for the pur-

103. *Id.*, slip op. at 13.

104. OHIO REV. CODE ANN. § 3313.60 (Page 1972) (amended 1975, 1978); *see* State v. Whisner, 47 Ohio St. 2d 181, 206 n.6, 351 N.E.2d 750, 765 n.6 (1976).

105. 47 Ohio St. 2d 181, 207, 351 N.E.2d 750, 765 (1976). The court apparently left intact the authorizing legislation—including the prescribed curriculum—and overturned only the effectuating regulations. *See* 37 OHIO ST. L.J. 899, 925 (1976).

106. 392 U.S. 236 (1968).

107. See text accompanying note 59 *supra.*

108. KY. REV. STAT. ANN. § 158.080 (Baldwin 1977); N.C. GEN. STAT. § 115-166 (1978) (superseded in part by N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979). The new legislation requires nonpublic schools to operate on a "regular schedule, excluding reasonable holidays and vacations, during at least nine calendar months of the year," but does not define "regular schedule." N.C. GEN. STAT. § 115-257.20, .7 (Supp. 1979).

109. 16 NCAC 2C.0703(c)(2)-(6), *reprinted in* State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 17 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979) (the regulations required a school day not shorter in length than that of the public schools in that administrative unit and required a minimum of six hours of supervision of students in the school room or on school grounds for all teachers).

110. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 883-84 (Ky. 1979); State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 12, 14, 17.

111. OHIO REV. CODE ANN. § 3313.48 (Page 1972) (amended 1973). See note 105 *supra.*

112. *See* EDb-401-02(G), *reprinted in* State v. Whisner, 47 Ohio St. 2d at 201, 351 N.E.2d at 762.

pose of incorporating faith into the educational setting.[113] The court doubted that any state interest existed of a magnitude sufficient to outweigh the severe impediment to first amendment freedoms posed by the regulations.[114]

Neither Kentucky nor North Carolina were as ambitious in allocating instructional time, but both states did require certain "quantities" of instruction in particular subjects. The North Carolina regulation upheld by the court in *Columbus Christian Academy* was hardly burdensome, requiring only ten units of instruction in five broad categories of learning during the four years from grades nine through twelve.[115] The regulation did not define "unit," but even if a school allotted an hour a day per unit of instruction, half or more of the school day would remain free from state regulation. The court held that compliance with this regulation did not hinder the schools in the practice or presentation of their religion.[116]

Similarly, Kentucky regulations required the use of "Carnegie Units" allocating daily instructional time for certain subjects.[117] Again, however, the unit requirements applied only to high schools and specified the area of study for only ten of the eighteen units of instruction required for graduation.[118] Although the court in *Rudasill* did not specifically discuss the use of such units, it prohibited the state from applying the public school accreditation standards, of which the unit requirements were a part, to private and parochial schools.[119] Since the court considered the standards violative of the state constitutional guar-

113. 47 Ohio St. 2d at 207, 351 N.E.2d at 765.

114. *Id.* at 218, 351 N.E.2d at 771.

115. 16 NCAC 2C.0703(d)(2), *reprinted in* State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 17 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979). See note 101 *supra*.

116. No. 78 CVS 1678, slip op. at 13.

117. Brief for Defendants, *Hinton*, at 15-16. Kentucky standards for grading, classifying, and accrediting elementary, middle, and secondary schools are prepared by the Kentucky State Board for Elementary and Secondary Education and incorporated by reference in 704 KAR 10:022 (1979).

118. 704 KAR 3:305(1) (1979) requires that

> [a]ll students in the common schools and all students in the private or parochial schools which are accredited by the State Board for Elementary and Secondary Education shall meet the following minimum credit requirements for high school graduation.
>
> (1) (a) Language arts—3;
> (b) Social studies . . .—2;
> (c) Mathematics—2;
> (d) Science—2;
> (e) Health—1/2;
> (f) Physical education—1/2.
>
> (2) (a) Required—10;
> (b) Elective—8;
> (c) Total—18.

119. 589 S.W.2d 877, 884 (Ky. 1979).

antee that no one be "compelled to send his child to any school to which he may be conscientiously opposed,"[120] it did not examine the federal issues.[121]

In summary, a state should be able to pursue its legitimate interest in a citizenry educated to participate intelligently in the democratic process by requiring that all children be instructed in subjects promoting that end.[122] While minimal amounts of instruction in these subjects may be required, the state may not so completely regulate the use of instructional time that it effectively excludes religious instruction or suffocates the type of independent decision-making on educational matters that the school was established to effectuate. The state interests at stake are not so compelling as to justify obliterating the constitutionally protected distinctiveness of private education.[123]

(c) *Teacher certification.* The fundamentalists have strenuously challenged the third aspect of state regulatory power over private education acknowledged by Justice White's majority opinion in *Allen*, that

120. KY. CONST. § 5. In examining the debates concerning adoption of this provision of section 5 (Section 5 is set out in full at note 165 *infra*), the *Rudasill* court emphasized the intent of the drafters to protect the right of parents to send their children to schools of their choice. 589 S.W.2d at 881. The court then concluded that the state must " '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." *Id.* at 884. The imposition of state accreditation standards on such schools, therefore, was considered a violation of section 5. *Id.*

If, however, section 5 does not prohibit the legislature from requiring attendance at some school, or prohibit the state from fulfilling its duty "to see that we have intelligent citizens," 589 S.W.2d at 882 (emphasis omitted) (quoting the provision's sponsor), then it is not clear why the state is necessarily precluded from establishing definitional restrictions as to what suffices as an educational alternative.

121. The court explained:

> [I]t is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution as it has been applied to the states. . . . Consequently, the Supremacy Clause of Article VI of the U.S. Constitution does not require us to ride with the Federales [*sic*] in order to reach a decision.

589 S.W.2d at 879 n.3 (citations omitted).

122. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court made an exception for adherents of the Old Order Amish faith. See text accompanying notes 62-77 *supra*. The North Carolina trial court found, however, that

> [p]ersons of the fundamentalist Christian faith believe that they are to be in the world, but not of the world. This belief precludes adoption of a materialistic world view . . . but does not involve isolation from the world . . . .
>
> . . . Fundamentalist Christians, unlike the Amish, do not practice physical separation from the rest of society, nor do they pursue a communal, agrarian lifestyle. It is anticipated that their children will grow up to work, live and actively participate in the community at large.

State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 11.

123. See text accompanying notes 78-83 *supra*.

of establishing teacher qualification standards.[124] In North Carolina, a state statute and regulations required all professional personnel in private schools to be certified as qualified to perform similar services in the public schools.[125] Teachers were required to have been graduated from "an approved teacher education institution," to have received the recommendation of that institution, and to have achieved a minimum score on the National Teacher Examinations.[126] In Kentucky the state interpreted the statutory requirement that private schools offer instruction in certain areas of study[127] as authorizing the state to insure the quality of the "instruments" of that instruction by the certification of teachers.[128] For private school teachers, certification required only a bachelor's degree from an accredited college.[129]

In both states[130] the fundamentalists opposed the certification requirement as a threat to their schools because there was at any given time only a small pool of teachers of the fundamentalist faith who might also meet state certification standards.[131] Evidence of that problem, however, was slim. Although some private schools in North Carolina had experienced difficulty in meeting teacher certification standards, the defendant fundamentalist schools in existence in prior years had received state approval.[132] Furthermore, the state had provided in 1975 for alternative provisional certificates which had alleviated many of the difficulties encountered by the other schools.[133] Because of these findings and the court's determination that the schools were not opposed to hiring qualified teachers, the court held that the North Carolina certification did not infringe upon the exercise of religion.[134] The court limited the state's certification authority, however, to those requirements related to teaching the "minimum courses of

124. See text accompanying note 59 *supra*.

125. N.C. GEN. STAT. § 115-256 (1978); 16 NCAC 2C.0703(e)(1), *reprinted* in State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 18.

126. Brief for Defendants, *Columbus Christian Academy*, at 67.

127. KY. REV. STAT. ANN. § 158.080 (Baldwin 1977).

128. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 883-84.

129. KY. REV. STAT. ANN,. § 161.030 (Baldwin 1977); Brief for Defendants, *Hinton*, at 11. "By contrast, teachers in public schools generally must have a degree from an accredited college in the subjects they teach and must have special training in education." *Id.*

130. In the *Whisner* case in Ohio, the court did not discuss teacher certification and apparently left intact the legislation authorizing it. See note 105 *supra*.

131. Brief for Plaintiffs, *Hinton*, at 28-29; Brief for Defendants, *Columbus Christian Academy*, at 34-35.

132. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 9-10.

133. *Id.*, slip op. at 9.

134. *Id.*, slip op. at 12-14, 18.

study approved or required by the State Board of Education."[135] In *Rudasill*, on the other hand, the Kentucky Supreme Court held that the state's certification requirement for private school teachers violated protections afforded by the Kentucky Constitution, and the court therefore did not reach the federal issue.[136]

The Kentucky and North Carolina trial courts differed sharply in their findings as to the relationship between teacher certification requirements and the educational competency of students. According to *Hinton*, the "extent or duration of teacher training can not be demonstrated by professional research to have any effect at all upon student academic achievement," and the "requirement of a Bachelor's Degree has no causal or reasonable relationship to guaranteeing a quality teacher."[137] The North Carolina court, however, disagreed: "To insure that the child receives [essential] skills, it is necessary that he be given instruction in basic subjects by individuals who are qualified and competent to teach those subjects. The statutes and regulations which have

135. Amendment to Judgment (Sept. 4, 1978), State v. Columbus Christian Academy, No. 78 CVS 1678. What the court intended by this limitation is unclear. It may have meant to limit state certification to those instructors teaching state-required courses, or to prohibit the state from requiring that teachers receive instruction in areas unrelated to those courses the state could require them to teach.

136. 589 S.W.2d at 879 n.3, 884. It is unclear why the state constitution necessarily precludes such certification. See note 120 *supra* and accompanying text.

In Hinton v. Kentucky State Bd. of Educ., No. 88314 (Franklin Cir. Ct., Ky. Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980), the state suggested that the potential financial burden of employing college-educated teachers was of concern to private schools in Kentucky. Brief for Defendants, *Hinton*, at 12-13. The fundamentalists, however, did not raise cost as a factor in their opposition to teacher certification, Brief for Plaintiffs, *Hinton*, at 28-29; instead, they expressed the "willingness of the parents to make heavy economic sacrifices in order to have a Fundamentalist religious education for their children." *Id.* at 21. Although the *Hinton* trial court found that "[c]ompliance with the various regulations . . . would be financially impossible for some of the church Plaintiffs," No. 88314, Findings of Fact and Conclusions of Law at 2, the briefs do not support this finding, and there is no evidence as to which regulations would impose such a burden. Furthermore, in Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961), the Supreme Court recognized the economic effect of Sunday closing laws on Orthodox Jews—who are required by their faith to abstain from work on Saturdays—but stated that

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

137. No. 88314, Findings of Fact and Conclusions of Law, at 9-10. The trial court also noted that "[a] Bachelor's Degree may be obtained at an accredited State-supported university in such subjects as Hotel-Motel Management, Restaurant Management, or Recreation." *Id.* at 7. The state, however, was evidently attempting only to insure that all teachers had acquired a higher education, with the consequent exposure to general college courses that are usually required regardless of the major, without imposing upon private schools the stricter requirement that their teachers hold degrees in the subjects they teach. See note 129 *supra*.

been adopted to achieve this end are based upon sound educational policy and logic."[138]

If educational studies or philosophies conflict in this critical area, and no better method of assuring that teachers are competent can be suggested,[139] the logic of requiring teachers to acquire some reasonable level of higher education should override the speculative fears of the schools that they will be unable to find certifiable teachers of their religious faith. If there is a legitimate and overriding state interest in the education of its citizens, it is an empty satisfaction to require that it be met without minimum standards—supported by logic if not statistics—as to what constitutes such education. The schools could still employ teachers on the basis of religious conviction, but only with consideration of other pertinent criteria as well.

Fundamentalists also challenged the states' allegedly unlimited power to change certification requirements at will.[140] The state at all times, however, remains subject to the limitations discussed previously to prevent it from infringing upon free exercise rights. The state interest in a particular regulation must be compelling and of sufficient magnitude to override any countervailing free exercise concerns; it may not threaten extinction of the right to alternative, private education; and the legislation and regulations must be narrowly drawn.[141] The sectarian schools, therefore, were adequately protected from unlimited state power but the state retained the flexibility to refine the qualification standards when the greater specificity the fundamentalists sought could be attained.

(d) *Textbook provisions.* Both the Kentucky and North Carolina cases discussed state regulation of teaching materials used in private schools.[142] In North Carolina the minimum standards for approval of nonpublic schools required that their textbooks and other instructional and library supplies be "substantially the same in quantity and quality as those provided in the public schools."[143] In practice, however, private schools were required only to furnish some type of instructional

138. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 14.

139. The educational expert who testified for the schools in *Hinton* admitted that "there is no standardized way of selecting good teachers." Brief for Defendants, *Hinton*, at 11.

140. Brief for Plaintiffs, *Hinton*, at 28; Brief for Defendants, *Columbus Christian Academy*, at 34.

141. See notes 48-50, 78-84 *supra* and accompanying text.

142. Regulation of instructional material was not at issue in the *Whisner* case in Ohio.

143. 16 NCAC 2C.0703(f), *reprinted in* State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 20 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

material, with the selection left to their discretion.[144] The court found this regulation to be beyond the statutory authority given the state to approve the teachers and curricula of nonpublic schools,[145] evidently not considering instructional materials a necessary ingredient of curriculum regulation.

The Kentucky State Board of Education argued that the statutory requirement that private schools offer certain courses of study obligated it to assure the quality of the materials used in such instruction.[146] Private schools were accordingly required to choose textbooks from a state-selected list or have alternative selections approved by the state. The content of proposed alternative texts had to "compare favorably with the content and material in the parallel State-approved textbooks, as subjectively determined by Department of Education personnel."[147] Despite the state's attempts to minimize the implications of this regulatory power over textbook selection,[148] the court held the power violative of the protection afforded private education by the Kentucky Constitution.[149]

Aside from any infirmities under state law, the constitutionality of textbook approval power under federal standards is doubtful. A state might legitimately require that some instructional materials be utilized in nonpublic schools to insure that a child receives more than an oral education. But to subject the actual content of instruction, and the means by which it is presented, to prior state approval borders closely on regulation of religious beliefs themselves rather than mere regulation of their exercise. The educational approach and instructional content of the fundamentalist schools are thoroughly governed by their religious nature, and the regulation of that content infringes upon their right to provide a religiously oriented education.[150]

144. State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 10.

145. *Id.*, slip op. at 19-20. The question of regulations exceeding the statutory grant of authority to the administrative agency is discussed in the text accompanying notes 167-70 *infra*.

146. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 883.

147. Hinton v. Kentucky State Bd. of Educ., No. 88314, Findings of Fact and Conclusions of Law at 8-9; Brief for Defendants, *Hinton*, at 13-15.

148. Legislation requiring approval of "text materials for private and parochial schools . . . if they are comprehensive and appropriate to the grade level in question notwithstanding the fact [that] they may contain elements of religious philosophy" became effective July 1, 1979. KY. REV. STAT. ANN. § 156.445 (Baldwin 1977). In addition, the state noted that the schools were free to qualify, or give different emphasis to, the materials presented in the textbooks and could, without state approval, use supplemental texts. Brief for Defendants, *Hinton*, at 15.

149. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 884.

150. In describing their religious beliefs and practices, the fundamentalists in Kentucky and North Carolina emphasized the "pervasively religious nature of the church schools; the involve-

The state's interest in a citizenry educated to participate and support itself in society must be satisfied through requirements that all children receive sufficient amounts of instruction from qualified teachers in subjects conducive to that end. Its interest in the added assurance of quality education that might be provided by the use of state-approved textbooks, however, is insufficient to justify the resulting infringement of free exercise rights.[151]

(e) *Other areas of regulation.* In neither Ohio nor Kentucky did the church-operated schools claim that the imposition of state fire, health, and safety regulations upon all schools infringed on free exercise rights.[152] When such regulations have been opposed as part of an overall denial of state authority to regulate a religious mission, courts have consistently upheld them as traditional and constitutionally permissible exercises of the state police power.[153]

The fundamentalists did contest the particular North Carolina requirement that private schools comply with public health laws. They feared that the state could thereby require private schools to offer sex education, including instruction on venereal disease and birth control.[154] The state, however, would not have authority under the health

ment of all curriculum, learning materials, teaching and activities in a unitary religious mission." Brief for Plaintiffs, *Hinton*, at 20; Brief for Defendants, *Columbus Christian Academy*, at 20.

In Kentucky the trial court found that "[i]n some subjects there are no State-approved textbooks which are religiously acceptable to Plaintiffs in keeping with their religious convictions; as all are in some manner objectionable—some because of what they include and others because of what they omit." Hinton v. Kentucky State Bd. of Educ., No. 88314, Findings of Fact and Conclusions of Law at 8. Although the fundamentalists had not sought approval of alternative textbooks, Brief for Defendants, *Hinton*, at 14, the criteria for approval indicate the same problem would have been encountered. See text accompanying note 147 *supra*.

151. For a contrary argument, see Comment, *Regulation of Fundamentalist Christian Schools*, *supra* note 17, at 423-24.

152. Hinton v. Kentucky State Bd. of Educ., No. 88314, Findings of Fact and Conclusions of Law at 5-6. In Ohio the Reverend Levi Whisner testified that his school allowed health, safety, and fire inspections by public officials, and there is no indication that he objected to the practice. State v. Whisner, 47 Ohio St. 2d 181, 189, 351 N.E.2d 750, 756 (1976).

In North Carolina, health, safety, and fire laws and regulations were among the body of state requirements generally opposed by the fundamentalists. 16 NCAC 2C.0703(h), *reprinted in* State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 20. The court found no infringement of free exercise rights as a result of this traditional exercise of police power but held that the authority to prescribe such requirements and inspect for their compliance was properly vested in agencies other than the board of education. *Id.*, slip op. at 12-13, 19-20.

153. Courts that have considered such claims have held either that the health and safety requirements did not infringe upon free exercise rights, Roloff Evangelistic Enterprises v. State, 556 S.W.2d 856, 859 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978), or that the state's interest in protecting the child's health and safety was sufficiently compelling to override generalized religious opposition to any state regulatory authority, *see* State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated as premature appeal of an interlocutory order*, 261 S.E.2d 908 (N.C. 1980). See note 61 *supra*.

154. Brief for Defendants, *Columbus Christian Academy*, at 40.

laws to prescribe instruction it could not otherwise require under its general authority to regulate the curriculum. For the state to require sex education over religious objections, it would have to demonstrate a compelling and overriding interest in such instruction.[155]

Both the Kentucky and Ohio regulations also required a program of school and community interaction, particularly at the elementary level, to reflect community needs in the educational purpose and planning of the school.[156] The schools claimed that they could not seek direction from the community without acting contrary to their religious beliefs and their reason for existence.[157] While it was not clear whether "community" meant the community at large or those persons served by a particular school,[158] such a requirement in either context transcends the states' legitimate sphere of interest. In both states, the provisions were among those held unconstitutionally to infringe upon protected rights.[159]

Other types of regulation suffer from similar infirmities. One example was Kentucky's requirement that all schools provide guidance counseling for students.[160] Although arguably related to promoting a self-supporting citizenry, the state's interest in guidance counseling is too peripheral to be enforced when it violates conscientious objections of a sectarian school or when the continued operation of the school is threatened by the burden of supplying counselors.[161] The requirement was among those held invalid under state constitutional protections, but without separate discussion by the court.[162] Another example was the Ohio regulations' broad requirement that "[a]ll activities [of public and nonpublic schools] shall conform to policies adopted by the board

155. See notes 48-50 & 84 *supra* and accompanying text.

156. EDb-401-07, *reprinted in* State v. Whisner, 47 Ohio St. 2d 181, 201-02, 351 N.E.2d 750, 762-63 (1976); *see* Brief for Defendants, *Hinton*, at 18-19. Kentucky standards for grading, classifying, and accrediting elementary, middle, and secondary schools are prepared by the Kentucky State Board for Elementary and Secondary Education and incorporated by reference in 704 KAR 10:022.

157. State v. Whisner, 47 Ohio St. 2d at 202, 210, 351 N.E.2d at 763, 767; Brief for Plaintiffs, *Hinton*, at 19.

158. *See* 37 OHIO ST. L.J. 899, 911-12 (1976).

159. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 884; State v. Whisner, 47 Ohio St. 2d at 210, 351 N.E.2d at 767.

160. Brief for Defendants, *Hinton*, at 19-20.

161. The state argued that the fundamentalists in Kentucky, unlike the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972), do not live physically apart from the world and therefore their children should be prepared to assume roles in society. Brief for Defendants, *Hinton*, at 19-20. Guidance counseling is less necessary to attaining that valid goal, however, than the other matters discussed previously. On the other hand, in a school for delinquent, emotionally disturbed, or retarded children, the need for some type of counseling in order successfully to integrate such children into society might well be sufficient to override even religiously-based opposition.

162. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 884.

of education."[163] The state has no legitimate interest in controlling *all* activities of private schools. The regulation, by its express wording, therefore unconstitutionally provided for standardization of educational policy and threatened the distinctiveness of private education.[164]

II. State Constitutional or Statutory Infirmities

Although permissible under the Federal Constitution, state regulation of private education may violate state constitutional or statutory provisions. Most, if not all, state constitutions contain a religion clause similar to that of the Federal Constitution, and some are more protective than their federal equivalent. The Kentucky Supreme Court determined that state-imposed teacher certification, textbook approval, and other accreditation standards, as applied to private and parochial schools, violated the religion clause of the Kentucky Constitution,[165] but the court recognized the possible validity of these regulations under federal analysis.[166]

Assuming that state legislation affecting private education is permissible, state agencies may not impose regulations that exceed their statutory grant of authority.[167] The North Carolina Board of

163. EDb-401-02(O), *reprinted in* State v. Whisner, 47 Ohio St. 2d at 201, 351 N.E.2d at 762.

164. State v. Whisner, 47 Ohio St. 2d at 207-08, 351 N.E.2d at 765-66. *But see* 37 Ohio St. L.J. 899, 909-11 (1976) (defining "conform" more narrowly).

165. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d at 884. The religion clause is found in section 5 of the Kentucky Constitution:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Ky. Const. § 5. But see note 120 *supra*.

166. See note 121 *supra*. The *Hinton* trial court had recognized no distinction between the religious protection afforded by the state and federal constitutions, and held the state regulations unconstitutional under both. No. 88314, Findings of Fact and Conclusions of Law at 11-12.

167. "Regulations adopted pursuant to a statutory grant of regulatory authority must be within the scope of the authority granted." State v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 14 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

Since the court held that the Kentucky regulations concerning teacher certification, textbook approval, and accreditation standards violated the religion clause of the Kentucky Constitution, it did not resolve the issue of statutory authority. The fundamentalists had asserted that the state board of education's statutory authority to "adopt rules and regulations relating to: . . . (8) [a]pproval of private and parochial schools of elementary and secondary grade," Ky. Rev. Stat. Ann. § 156.160 (Baldwin 1977), was limited to insuring that such schools complied with the statutory mandate to teach in the English language, offer instruction in certain branches of study, and

Education's regulatory authority was derived from the state's compulsory attendance law and legislation, which required the board to supervise and regulate nonpublic schools to insure compliance with minimum standards as to teacher qualifications, curriculum requirements, and length of the school term.[168] In *Columbus Christian Academy* the court held that regulations concerning instructional materials and teacher-student ratios exceeded the scope of authority granted by the statutes, and therefore enjoined enforcement of the regulations.[169] In addition, the court found that the Board of Education had improperly assumed the authority to impose health and safety regulations, which authority was in fact vested in other agencies.[170]

Furthermore, an otherwise constitutional authorizing statute may not be defined so vaguely that it unconstitutionally delegates legislative authority to the administrative agency.[171] The proper application of this conceptual guideline, however, is far from clear. As acknowledged by a Kentucky court in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*, " '[t]he correlation between the theory and the holdings is characteristically low, and when it is high the holdings have been unfortunate when examined in the light of practical needs of effective government.' "[172] In *Butler*, the court upheld an act authorizing the Kentucky State Board of Education to determine which private schools were eligible to receive funds for the education of gifted children by virtue of the special nature of their curricula. Examining the need for

provide a 185-day term; *id.* § 158.080. Brief for Plaintiffs, *Hinton*, at 6-8. The state argued that these two statutes created "two separate tiers of regulation," empowering the state to adopt such regulations as were not inconsistent with the mandated requirements. Supplementary Brief for Defendants at 2, Hinton v. Kentucky State Bd. of Educ., No. 88314 (Franklin Cir. Ct., Ky., Oct. 4, 1978), *aff'd in part and rev'd in part sub nom.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 100 S. Ct. 2158 (1980).

168. N.C. GEN. STAT. § 115-166, -255 to -256 (1978) (amended 1979), set out in part at note 94 *supra*.

169. No. 78 CVS 1678, slip op. at 19-20, 22.

170. *Id.*, slip op. at 20, 22.

171. Both the Kentucky and North Carolina Constitutions vest the legislative power of the state in the general assembly and prohibit its exercise by any other branch of government. KY. CONST. §§ 28-29; N.C. CONST. art. I, § 6, art. II, § 1. Challenging the delegations of authority in these two states, the fundamentalists acknowledged that the legislature may delegate discretion to effectuate a legislative purpose when the statute contains sufficient "standards" to control the exercise of such discretion. Brief for Plaintiffs, *Hinton*, at 13; Brief for Defendants, *Columbus Christian Academy*, at 9. As stated in Butler v. United Cerebral Palsy of Northern Kentucky, Inc., 352 S.W.2d 203 (Ky. App. 1961), however, "Our decisions and those of the other courts of last resort in this country are replete with mention of 'standards,' much of which has been characterized by a leading authority as mumbo-jumbo. . . . 'The need is usually not for standards but for safeguards.' " *Id.* at 207 (quoting 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 125, 151 (1958)).

172. 352 S.W.2d 203, 208 (Ky. App. 1961) (quoting 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 103-04 (1958)).

effective and efficient government, the court found that the legislature had

> neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable.[173]

In *State v. Williams*[174] the North Carolina Supreme Court held unconstitutional, as an "unwarranted delegation of legislative power," a statute requiring all business, trade, or correspondence schools soliciting students within the state to obtain an annual license from the State Board of Education.[175] The stated purpose of the licensing procedure was "to protect the public welfare by having the licensed business, trade, or correspondence schools maintain proper school quarters, equipment, and teaching staff and to have the school carry out its advertised promises and contracts made with its students and patrons."[176] As the law provided no further guidelines for carrying out this purpose, the court refused to uphold the provision:

> The Legislature has set no standards for evaluating the contract, advertising material or instructional program. Furthermore, no test or rule of any kind has been established for determining the fitness of the solicitor. All these matters are left to the unlimited discretion of the administrative body—a body which, most likely, has little familiarity with the operation of schools of this type. Such unlimited delegation of authority is beyond the bounds of valid legislation.[177]

The North Carolina nonpublic school legislation challenged in *Columbus Christian Academy* left less to agency discretion than did the statute concerning business, trade, and correspondence schools overturned in *Williams*. Rather than merely stating a general welfare objective, the nonpublic school legislation expressed the educational goal that such schools be regulated "to the end that all children shall become citizens who possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship."[178] Furthermore, the law specified the nature and scope of the regulations in some detail.[179] These express guidelines seem sufficient to prevent

173. 352 S.W.2d at 208.

174. 253 N.C. 337, 117 S.E.2d 444 (1960).

175. *Id.* at 347, 117 S.E.2d at 451. The statute required such schools to submit an application, and a license was to be issued if the Board approved the schools' instructional programs and the soliciting individuals. N.C. GEN. STAT. § 115-253 (1960) (amended 1961).

176. N.C. GEN. STAT. § 115-249 (1960) (amended 1961).

177. 253 N.C. at 346, 117 S.E.2d at 451.

178. N.C. GEN. STAT. § 115-255 (1978).

179. The statute authorized regulations "to prescribe a course of study with instruction in such branches of education as required in public schools and taught in the English language, except for

the abuse that is possible from unbridled discretion.[180] To require further specification would embroil the legislature in decisions of educational policy that would be better left to the agency established and qualified to make such decisions.

In summary, state legislation should indicate clearly those areas—within constitutional limits—in which private schools are subject to state regulation in order for attendance at such schools to comply with compulsory education laws. If overly vague, the statutes may unlawfully delegate legislative power, or their effectuating regulations may be unauthorized. Beyond indicating the purpose and particular areas of regulation, however, legislatures should be free to allow qualified agencies to make and, when necessary, to alter the educational policy decisions required to effectuate the legislative objectives.

III. IMPLICATIONS OF DEREGULATION

A. *Policy Considerations and State Constitutional Mandates.*

Following the North Carolina trial court decision upholding most of the state's regulations affecting private schools,[181] the state legislature, in response to intense lobbying, effectively mooted the decision prior to argument on appeal by enacting deregulating legislation.[182] The legislation provides that the state's compulsory school attendance laws may be met by a child's attendance at a private church school, school of religious charter, or qualified nonpublic school. If the school is new, it must notify the state of its intent to operate. All schools must maintain attendance and disease immunization records; comply with reasonable fire, safety, sanitation, and health laws; operate on a regular

foreign language courses; to require a term concurrent with that of the public schools, and to provide that teachers meet certification standards and follow the pupil promotion provisions of public schools." N.C. GEN. STAT. §§ 115-166, -225 to -226 (1978 & Supp. 1979).

180. The Kentucky Supreme Court did not analyze the legislation authorizing regulation of nonpublic schools, but the state's interpretation would have allowed for such limitless discretion. As also described in note 167 *supra*, the state claimed a virtually unlimited grant of authority over private and parochial schools under a statute authorizing the adoption of rules and regulations by the state for approval of such schools (KY. REV. STAT. ANN. § 156.160 (Baldwin 1977)). The fundamentalists asserted that the approval authority was limited to the minimal requirements placed upon such schools by a second statute mandating instruction in the English language in certain branches of study for a specified term (*Id.* § 158.080). Under the state's interpretation, the first statute certainly "authorized" state-imposed standards for textbook approval and teacher certification. The standards would presumably fail, however, as an unconstitutional exercise of legislative power by an administrative agency. While the latter problem does not arise under the fundamentalists' interpretation, the scope of authority within which regulations might be formulated is significantly narrowed.

181. State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

182. See note 14 *supra*.

schedule for at least nine months, excluding reasonable vacations and holidays; administer annually any nationally standardized test measuring achievement in certain areas to students in particular grades; and make the records of such testing available for state inspection.[183] By expressly providing that these requirements are exclusive, the legislature exempted all private schools from any other regulations, including the requirements of teacher certification and certain courses of instruction, which the trial court had upheld.

The implications of this deregulation quickly became apparent. In the six months following enactment of the legislation, thirty-two new schools informed the state of their intent to operate.[184] Fundamentalist churches established fifteen of these schools; several others consist of families teaching their children at home or in local churches.[185] The state has no power, under the new legislation, to affect the quality of instruction at such schools. Besides exempting nonpublic schools from any curriculum or teacher qualification standards, the law does not define its reference to a "regular schedule," does not require that any instructional materials be provided, leaves the school free to select the national tests it will administer and the minimum test score it will require for high school graduation, and makes no provision for state action if test results indicate that a school is educationally ineffective.[186] The state's only remaining area of control is through its definition of the word "school." In attempting to interpret that word after the change in legislation, the state Attorney General's office has indicated its opinion that a parent teaching his or her own child in the home will not be considered a school; "[n]either size nor facility, however, is in and of itself, determinative of what constitutes a 'school.' "[187] Furthermore, compliance with even this minimal definitional requirement may be difficult to determine, because "[t]he law doesn't permit getting enough information to make an intelligent decision on whether it's a school or not."[188] The assessment of one education official, that "[y]ou

183. N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979). Private church schools and schools of religious charter are not further defined by the statute; any school which receives no state funding is a qualified nonpublic school. N.C. GEN. STAT. § 115-257.19 (Supp. 1979).

184. Carroll, *Educators say school attendance law undercut*, News and Observer (Raleigh, N.C.), Oct. 25, 1979, at 1, col. 1.

185. *Id.*

186. Letter from Edwin M. Speas, Jr., *supra* note 87.

187. *Id.*

188. Carroll, *supra* note 184, at 7, col. 1 (quoting J. Frank Yeager, superintendent of Durham (N.C.) County Schools).

can have some children play poker at night for nine months and then give them a diploma,"[189] is frighteningly close to reality.

On the authority of *Pierce v. Society of Sisters*, the New Hampshire Supreme Court noted in a 1929 case involving home instruction that "the state is entitled to establish a system whereby it can be known, by reasonable means, that the required teaching is being done."[190] North Carolina has failed to establish such a system and instead has left the courts to enforce compulsory school attendance and to monitor educational quality solely by defining the term "school."[191] The assurance of a fundamentalist spokesman defending the deregulation—"Anybody with a grain of common sense knows the people aren't going to pay a fortune to send their children to private schools for an inferior

189. Brown, *Private Schools Held Free of N.C. Standards*, Durham Morning Herald (Durham, N.C.), Oct. 5, 1979, § A, at 1, col. 2.

190. State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929). Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 462 (N.D. Ill. 1974), also acknowledged the difficulty of regulating home instruction:

> The distinction in treatment by the State between parents who send their children to institutional schools and those who educate them at home directly relates to the difficulty that the State would surely face in supervising, at considerable expense, a host of facilities and individuals, widely scattered, who might undertake to instruct their children at home; as compared with the less difficult and expensive supervision of teachers and facilities in organized public and private schools.

191. North Carolina may not be the only state in such a position. Cases determining whether home instruction complies with compulsory school attendance laws vary in outcome depending upon the statutes involved and the concept of education affecting a court's definition of a "private school." The convictions of parents for violating compulsory school attendance laws by instructing their children at home have been upheld in numerous cases because the parents failed to acquire prior state approval, or because the home instruction did not qualify as education in a "private school" by state standards or judicial definition. *See* People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (1953) (home instruction did not meet statutory requirements for alternatives to public school instruction), *appeal dismissed*, 347 U.S. 972 (1954); State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963) (home instruction did not provide a statutory course of instruction, nor were the parents, by the purpose or character of their endeavor, operating a private school); Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955), and State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929) (parents giving home instruction without prior approval by school authorities violated compulsory attendance statutes); Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948) (parents who failed to seek prior state approval of their qualifications to teach could not raise the sufficiency of their home instruction as a defense for violation of a school attendance law); State v. Superior Ct., 55 Wash. 2d 177, 346 P.2d 999 (home instruction by a parent without a teaching certificate or prior approval violated compulsory attendance laws; approval of alternative education was to be guided by minimum standards applied to public schools), *cert. denied*, 363 U.S. 814 (1960). State v. Counort, 69 Wash. 361, 124 P. 910 (1912) (home instruction by a parent was not within the meaning of a law requiring attendance at public or private school).

For decisions upholding home instruction under compulsory education laws, see People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950) (a parent sustained the burden of showing that the instruction she gave was commensurate with that of public schools); State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904) (a child attended a private school within the meaning of the statute where a private tutor provided home instruction equivalent to that of public schools). *See also* Notes & Comments, *supra* note 26.

Attempts at home instruction have been increasing in recent years. *See* Stevens, *Angry at Schools, More Parents Try Teaching at Home*, Wall. St. J. (Easteru ed.), Sept. 13, 1979, at 1, col. 4.

education"[192]—may be sadly naive.[193] Furthermore, the voluntary compliance with desired standards by some schools or parents does not obviate the overall need for regulation: "The law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child."[194]

Apart from the educational implications, a state's legislative deregulation of private schools might be considered a violation of state constitutional mandates. The North Carolina Constitution, for example, stipulates that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[195] More specifically, it requires that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."[196] This fairly typical provision is followed by the requirement that the General Assembly provide for a "uniform system of free public schools" which all children of appropriate age and ability must attend unless educated by other means.[197]

These constitutional provisions have been recognized as requiring the state to insure the "establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and 'the duty of the State to maintain and guard that right,' while guaranteeing equal opportunities to all students."[198] The extent of this duty, however, has been tested only in the context of public education;[199] no authority has been found to support a construction of these provisions that would require the state to insure the quality of alternative, private education. While such a construction is not illogical from the wording of the provision,[200] it may be that the state fulfills its duty by requiring

192. *Quoted in* Carroll, *supra* note 184, at 7, col. 1.

193. See text accompanying notes 184-89 *supra*.

194. People v. Levisen, 404 Ill. 574, 577, 90 N.E.2d 213, 215 (1950).

195. N.C. CONST. art. I, § 15.

196. *Id.* art. IX, § 1.

197. *Id.* art. IX, §§ 2, 3.

198. Webster v. Perry, 512 F.2d 612, 615 (4th Cir. 1975) (dictum) (quoting N.C. CONST. art. I, § 15). The North Carolina Supreme Court has long held that the provisions of article IX of the state constitution are mandatory. *See, e.g.*, Mebane Graded School Dist. v. Alamance Co., 211 N.C. 213, 189 S.E. 873 (1937).

199. *See* Webster v. Perry, 512 F.2d 612 (4th Cir. 1975) (concerning due process rights of students expelled from public schools); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972) (students excluded from public school without due process); Mebane Graded School Dist. v. Alamance Co., 211 N.C. 213, 189 S.E. 873 (1937) (counties are required to assume the debts of the school district incurred in providing a public school building and equipment).

200. A child's right to an education, as protected by the North Carolina Constitution, may be meaningless unless that education must meet some standard of quality. But whether the state

that all children of certain ages attend some "school" and by providing the option of attendance at free, public schools.

B. *Deregulation and the Establishment Clause.*

Deregulation raises federal constitutional issues in addition to the state issues previously discussed. Chief Justice Burger stated in *Wisconsin v. Yoder* that

> the Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.[201]

The Court did not discuss this issue further, holding instead that the free exercise claim of the Amish required an exception to the state's compulsory school attendance law. The Court recognized that the two religion clauses must be applied with "doctrinal flexibility" to avoid rendering both ineffective.[202] If, however, North Carolina's regulation of sectarian schools did not violate free exercise rights (as the trial court had in fact held), deregulation of such schools merits more careful examination under the establishment clause.

1. *Traditional Analysis.* Establishment clause analysis consists of applying the tripartite test summarized in *Committee for Public Education and Religious Liberty v. Nyquist*:[203] "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . ."[204] North Carolina's deregulation of private schools cannot easily be challenged under this standard. The third prong of the test is satisfied; the new legislation actually reduces the state's involvement with church-operated schools.[205]

---

violates a constitutional mandate when it allows parents to set those standards—as long as the child is attending school—is perhaps as much a question of policy as of constitutional construction. While this Comment argues that North Carolina *may* regulate, there is little if any authority for determining whether it *must* regulate.

201. 406 U.S. 205, 220-21 (1972).

202. *Id.*

203. 413 U.S. 756 (1973).

204. *Id.* at 773 (citations omitted).

205. The new legislation is summarized in the text accompanying note 183 *supra*. Under the legislation and regulations upheld by the trial court, the state could require information from private schools to ascertain compliance with state standards in the areas of "teacher certification, curriculum, length of school day, length of school year and such other areas as may be specifically referred to by statute, such as health certification and student innoculation." Amendment to

The prohibitions of the first and second prongs of the test may be described in concert: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution."[206] The North Carolina statute concerning sectarian schools states:

> [I]t is the public policy of the State in matters of education that "No human authority shall, in any case whatever, control or interfere with the rights of conscience" or with religious liberty and that "religion, morality and knowledge being necessary to good government and the happiness of mankind . . . the means of education shall forever be encouraged."[207]

Although the statute refers specifically to religion, it does little more than reiterate the state constitution's equivalent of the free exercise clause. Without some further evidence of a legislative intent to aid religion, the stated policy alone does not reflect an unconstitutional purpose. In *Walz v. Tax Commission*[208] the Court found no intent to establish, sponsor, or support religion in a statute that exempted from taxation property used wholly for religious, educational, or charitable purposes.[209] Instead, the Court described the statute as "simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."[210] Likewise, the purpose of the North Carolina legislation might have been to relieve sectarian schools from having to seek state approval, and the state from having to make these determinations, on the legislative belief that such schools were adequately serving the state's educational interests.

Even where a secular purpose exists, the legislation must not have the primary effect of advancing religion.[211] This prohibition has traditionally been interpreted as precluding "sponsorship, financial support, and active involvement of the sovereign in religious activity."[212] The question of sponsorship arises when a regulation affirms or promotes

---

Judgment (Sept. 4, 1978), State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C. Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979).

206. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

207. N.C. GEN. STAT. § 115-257.6 (Supp. 1979) (quoting N.C. CONST. art. I, § 13, art. IX, § 1).

208. 397 U.S. 664 (1970).

209. *Id.* at 666, 674.

210. *Id.* at 673.

211. *E.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court used the "primary effect" test to overturn a New York statute providing aid to nonpublic schools. In a footnote, however, the Court indicated that "metaphysical judgments" of primary or secondary effect were unnecessary, and that the Court should instead ascertain whether legislation has "the *direct* and *immediate* effect of advancing religion." *Id.* at 783 n.39 (emphasis added).

212. Walz v. Tax Comm'n, 397 U.S. at 668.

religious beliefs, thereby employing the state's power for the benefit of religion.[213] Courts have invalidated many types of financial aid to religious organizations, no matter how secular the state's ultimate objective, unless the benefit is particularly indirect, the effect sufficiently neutral between religion and nonreligion, or the use easily severable from religious functions.[214] The drafters of the religion clauses believed that the state's use of its taxing power for the benefit of religion was particularly invidious; Madison's famous Memorial and Remonstrance, persuasively articulating the philosophy later incorporated in the first amendment, was written to oppose a tax for the support of religious education.[215] As Justice Douglas explained in his concurrence in *School District of Abington Township v. Schempp*, "[t]he most effective way to establish any institution is to finance it . . . ."[216]

North Carolina's deregulation of sectarian schools does not have the primary effect of establishing religion under the traditional understanding of the phrase. It neither promotes religious belief nor employs public funds for the benefit of religion. The Court has recognized, however, that the leading cases applying the establishment clause offer no "bright line" guidance for its application,[217] and that "[c]areful students of the history of the Establishment Clause have found that 'it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it . . . .' "[218] Furthermore, historical perspectives may be particularly out of place in analyzing the establishment clause in the context of education: "[T]he structure of American education has greatly changed since the First Amendment was adopted. . . . Education, as

213. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court held that a statute prohibiting the teaching of evolution in publicly supported schools was an establishment of religion because the purpose and effect of the legislation were to give preference to a fundamentalist religious doctrine and to preclude any teaching contrary to that doctrine. Although Sunday closing laws were challenged as an establishment of religion in McGowan v. Maryland, 366 U.S. 420 (1961), the Court upheld the laws because it found that their purpose and primary effect were not to encourage Sunday worship, but to set aside a common day of rest and recreation.

214. Representative of cases holding unconstitutional various forms of financial assistance to religion are Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and McCollum v. Board of Educ., 333 U.S. 203 (1948). Opinions upholding legislation against establishment clause challenges include Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968); and Everson v. Board of Educ., 330 U.S. 1 (1947).

215. For a discussion of the history of the religion clauses, see Everson v. Board of Educ., 330 U.S. at 8-15, with Madison's Memorial and Remonstrance appended.

216. 374 U.S. 203, 229 (1963) (Douglas, J., concurring).

217. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 761 n.5.

218. Flast v. Cohen, 392 U.S. 83, 125-26 (1968) (Harlan, J., dissenting) (quoting C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 142 (1964)).

the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials."[219]

2. *Ceding State Authority*—State v. Celmer. If historical or traditional judicial understanding in this area is therefore not definitive, other interpretations may be examined. A recent case before the New Jersey Supreme Court, *State v. Celmer*,[220] suggests an alternative approach. In that case, the constitutionality of a statutory scheme granting municipal powers to a religious assembly ground and seaside resort, the Ocean Grove Camp Meeting Association of the United Methodist Church, was challenged by a man convicted of traffic offenses in the Association's municipal court. The campground, established by Methodist clergy and incorporated by state charter, is governed by a Board of Trustees composed of clerical and lay members who must be members in good standing of the United Methodist Church. This Board established the police department and municipal court, which arrested and convicted Celmer, to insure compliance with municipal ordinances promulgated under the police powers granted the Board by state legislation.[221]

The New Jersey Supreme Court characterized the challenged legislation as providing that "in Ocean Grove the Church shall be the State and the State shall be the Church. . . . Government and religion are so inextricably intertwined as to be inseparable from one another."[222] In analyzing the separation of church and state required by the first amendment, the court held that "there can be no question but that at a minimum it precludes a state from ceding governmental powers to a religious organization."[223] Allowing a religious group to exercise governmental functions may be the extreme opposite of excessive governmental involvement with religion,[224] but it is no less a prohibited form of entanglement.

219. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 238 (1963) (Brennan, J., concurring).

220. 80 N.J. 405, 404 A.2d 1, *cert. denied*, 444 U.S. 951 (1979).

221. Specifically, the New Jersey legislature had granted to the Board municipal powers to make rules and regulations—having the effect of ordinances—for public health and safety, to prescribe penalties for their violation, and to enforce them through a police department and a municipal court with a Board-appointed court magistrate. 404 A.2d at 4.

222. *Id.* at 6.

223. *Id.* The court held that in the future such essentially governmental functions must be exercised by Neptune Township, of which Ocean Grove is a part. The Association may continue to adopt rules to protect the campground's unique cultural and spiritual heritage but may not enforce compliance by exercising municipal functions.

224. For an example of the more conventional type of entanglement question, see Lemon v. Kurtzman, 403 U.S. 602 (1971), in which two states' plans for providing salary supplements, or

Although no Supreme Court decision directly addresses "reverse entanglement,"[225] the prohibition of this type of entanglement is clearly supported by historical and judicial interpretations of the reach of the establishment clause. In 1856, the American lawyer and judge Jeremiah Black expressed the view that the "manifest object of the men who framed the institutions of this country, was to have a *State without religion* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other."[226] In *McCollum v. Board of Education*,[227] the Supreme Court held that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[228] In his concurrence in that case, Justice Frankfurter agreed that "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."[229]

As Justice Brennan recognized, however, "the line which separates the secular from the sectarian in American life is elusive."[230] On closer examination, the argument that North Carolina ceded a governmental function to religious organizations when it allowed sectarian schools to determine the type of education that children need to become productive and politically effective citizens encounters several conceptual difficulties. First, although state regulation of sectarian schools to insure the development of an educated citizenry has repeatedly been recognized as a compelling state *interest*,[231] it may not so clearly be a state *function* as were the legislative, judicial, and police powers ceded to the Ocean Grove Association in *State v. Celmer*. The finding of a state function might be easier in states such as North Carolina, whose constitution requires the state to guard the right to an education, but where,

---

reimbursement for salary and instructional materials, for the teaching of secular subjects in nonpublic schools were held unconstitutional as impermissibly involving government in religion.

225. The closest analysis occurred in Walz v. Tax Comm'n, 397 U.S. 664 (1970), discussed in the text accompanying notes 241-48 *infra*.

226. J.S. BLACK, *Religious Liberty*, in ESSAYS AND SPEECHES OF JEREMIAH S. BLACK 51, 53 (C. Black ed. 1885) (emphasis in original), *quoted in* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) *and in* McCollum v. Board of Educ., 333 U.S. 203, 219 n.8 (1948) (separate opinion of Frankfurter, J.).

227. 333 U.S. 203 (1948).

228. *Id.* at 212.

229. *Id.* at 227. *See also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

230. School Dist. of Abington Township v. Schempp, 374 U.S. at 231.

231. See notes 55-59 *supra* and accompanying text.

as indicated previously, the extent of such a duty is unclear.[232] Even without an explicit duty to regulate, the long involvement of North Carolina in setting educational standards for all schools, the implications of nonregulation, and the history of judicial deference to reasonable regulation could support the recognition of some affirmative state obligation.[233]

The establishment argument might also be challenged on the theory that the legislation benefits all nonpublic schools, not just sectarian schools. As stated in *Committee for Public Education and Religious Liberty v. Nyquist*, "in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor."[234] Thus, in *Everson v. Board of Education*[235] and in *Board of Education v. Allen*,[236] the fact that reimbursement of bus transportation

232. See notes 195-200 *supra* and accompanying text.

233. Characterization of regulation of all education as a state function or affirmative duty may be buttressed by an equal protection analysis, assuming that a litigant has standing to raise the argument. Arguably, the state denies the equal protection of its laws to those children for whom it fails to insure a basic education. By exempting certain schools from state educational standards, the state may deprive the pupils attending them of an equal opportunity to enjoy the benefits of full participation in society and the workplace. In his dissent in *Wisconsin v. Yoder*, Justice Douglas expressed this concern:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.

406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting). While Justice Douglas was arguing for recognition of the religious liberty of the children involved, his analysis also supports an equal protection claim. The majority opinion, and the concurring opinion of Justices Stewart and Brennan, noted the possibility of restricting the children's rights but held that such an issue had not been presented by the record. *Id.* at 231, 237. Justices White, Brennan, and Stewart, in a separate concurrence written by Justice White, held that the minimal difference between the state requirement of school attendance until age 16 and the eighth grade education accepted by the Amish would not place the Amish children at any lasting disadvantage. *Id.* at 240. If an insufficiency exists throughout the child's formal education, however, he may never overcome the learning disadvantages incurred in earlier years. As the state surely must protect all children, if it protects any, from the infliction of physical disabilities by their parents, so it arguably must protect all children, if it protects any, from the equally crippling intellectual disability of having been denied a basic education.

234. 413 U.S. 756, 794 (1973). The ratio of sectarian to nonsectarian schools in North Carolina is unknown. In *Columbus Christian Academy* the state estimated that 319 private schools educated four percent of the state's school-age children in 1977-78. Brief for Plaintiffs at 2, State v. Columbus Christian Academy, No. 78 CVS 1678 (Wake County Super. Ct., N.C., Sept. 1, 1978), *vacated as moot and dismissed* (N.C. May 4, 1979). The number of private schools has increased since that time, and the fundamentalists estimated there were 100 Christian academies in the state as of November, 1979. Christensen, *supra* note 3. It is not known how many other private schools in North Carolina are associated with nonfundamentalist churches.

235. 330 U.S. 1 (1947).

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

expenses and loans of secular textbooks were made to all school children, regardless of religious affiliation, was a factor in the Court's conclusions that the statutes were religiously neutral and constitutionally permissible.[237] It was also of significance, however, that the benefits to the schools were indirect and were severable from their religious functions.[238]

North Carolina enacted two separate statutes providing for deregulation of nonpublic schools—one concerning religious schools and the other concerning private nonsectarian schools.[239] Although the inclusion of the latter provision might indicate the secular purpose of the overall scheme of legislation, if the state has conferred a governmental power upon a religious organization in violation of church-state separation, the former statute alone might be held unconstitutional.[240]

Finally, the most comparable Supreme Court case, *Walz v. Tax Commission*,[241] offers little support for this establishment argument. The Court upheld a New York statute exempting from taxation "real or personal property used exclusively for religious, educational or charitable purposes"[242] against an establishment clause challenge. It concluded that the exemption was not sponsorship, "since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[243] Nor did the legislation reflect a purpose to benefit religion; it was instead described as "benevolent neutrality."[244] The Court recognized that religious groups

237. *See* Board of Educ. v. Allen, 392 U.S. at 244-45; Everson v. Board of Educ., 330 U.S. at 18.

238. In Board of Educ. v. Allen, 392 U.S. at 245, the Court assumed that school authorities were complying with the law and lending only secular textbooks to children in private schools.

239. The distinction in application is indicated by the names of the two pieces of legislation: An Act to Create an Article to Deal Specifically with Private Church Schools of Religious Charter, and An Act to Create an Article to Deal with Certain Qualified Nonpublic Schools, ch. 505-06, 1979 N.C. Sess. Laws 529 (codified at N.C. GEN. STAT. § 115-257.6 to .13, .19 to .26 (Supp. 1979)).

240. *See* Sloan v. Lemon, 413 U.S. 825, 834 (1973). Furthermore, even if deregulation of private nonsectarian schools were constitutional, that fact alone would not sustain an equal protection argument sufficient to require deregulation of sectarian schools in violation of the establishment clause. *See id.* In North Carolina, if state regulation of all education were held to be a governmental function in the sense required by this argument, deregulation of private nonsectarian as well as sectarian schools might be considered a violation of the state constitution. See notes 195-200 *supra* and accompanying text.

241. 397 U.S. 664 (1970).

242. *Id.* at 666.

243. *Id.* at 675.

244. *Id.* at 670, 672. *See also* Zorach v. Clauson, 343 U.S. 306 (1952), in which the Court upheld a "released time" program allowing school children to leave public school during the school day for religious instruction at religious centers. The Court held that

> [w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our

were only one of a broad class of nonprofit organizations exempted from taxation, and that exemption would involve far less entanglement between church and state than taxation, which would require property valuations and imposition and foreclosure of liens.[245] Furthermore, the Court noted an almost two hundred year history in this country of providing tax exemptions for religious bodies, reflecting the historical concern "as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers."[246]

Although *Walz* is hardly supportive of the establishment argument, neither does it refute the argument dispositively. North Carolina's deregulation of private schools admittedly might be characterized as an exemption reflecting benevolent neutrality and extending to a broad educational sector, of which sectarian schools are only a part.[247] In addition, deregulation involves less contact between church and state than did the previous regulatory scheme, and history offers no examples of such deregulation or nonregulation being held unconstitutional. But history does afford numerous examples affirming the constitutionality of state regulation of sectarian schools,[248] and regulation does not pose the degree of latent danger long associated with state taxation of religious organizations. Furthermore, deregulation is more

---

traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 313-14. In short, the first amendment "does not say that in every and all respects there shall be a separation of Church and State." *Id.* at 312.

245. 397 U.S. at 673-74.

246. *Id.* at 673, 677-78.

247. The North Carolina Supreme Court recently expressed support for broadly defined religious exemptions from state regulation that, as in Walz v. Tax Comm'n, 397 U.S. 664 (1970), "effect . . . benevolent neutrality, partaking of neither sponsorship nor hostility toward religious affairs." Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 409, 263 S.E.2d 726, 732 (1980). In analyzing the constitutionality of legislation requiring public disclosure and state licensing of charitable organizations soliciting within the state, N.C. GEN. STAT. § 108-75.1 to .25 (1978 & Supp. 1979), the court indicated in a footnote that the exemption from such regulation that is accorded religious organizations satisfies the first amendment's requirement of religious neutrality. 299 N.C. at 410 n.5, 263 S.E.2d at 732. The court, however, held the statute's denial of an exemption to religious organizations deriving their financial support primarily from contributions solicted from *non*members to be an unconstitutional establishment of religion by favoring congregational over more evangelical religions. *Id.*, at 410-11, 263 S.E.2d at 732-33. Three judges dissented, stating that exemption of some but not all religious activity is permissible under the establishment clause where classifications "bear a substantial relation to the secular purposes advanced by the legislation." *Id.*, at 419, 263 S.E.2d at 738. Finding a sufficient relationship between the denial of exemption and the state's purpose in protecting the public, the dissent would have upheld application to the plaintiffs of most provisions of the statute under both the establishment and free exercise clauses. *Id.*, at 424, 426, 431-32, 263 S.E.2d at 740, 742, 745.

248. See notes 55-59 *supra* and accompanying text.

than an exemption; the state arguably has ceded a governmental function to a religious body, a possibility not of concern in *Walz*.

A court decision holding North Carolina's deregulation of sectarian schools unconstitutional as an establishment of religion, for conferring upon religious organizations the governmental function of assuring the minimal educational preparedness of its citizens, would admittedly reflect a new step—if not a leap—in first amendment application. But the "breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' "[249] The authors of the first amendment

> did not simply prohibit the establishment of a state church or a state religion . . . . Instead, they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. . . . [Such a law] is not always easily identifiable as one violative of the Clause.[250]

IV. CONCLUSION

Apart from unique prohibitions of state law, a state may reasonably regulate sectarian and other private education by carefully drafted legislation and effectuating regulations. That the issue continues to be legislated upon and litigated shows the uncertainty respecting the boundaries of reasonableness and the tenacity of religious groups in seeking relief from all state authority over education, or at least freedom from all prior regulation in contrast to after-the-fact regulation through standardized testing. Confusion, often heightened in the face of political pressure, should not encourage a state to withdraw from protecting the most valuable advantage it can offer its young citizenry: a basic education allowing effective and rewarding participation in society. The ceding to religous organizations of a state's constitutional authority—and perhaps obligation—to ensure minimal educational advantages to all children raises legal and policy considerations and may forecast a future trend in establishment clause analysis.

The 1980s promise to raise many new issues of church-state relations, particularly in the context of education.[251] The constitutional insights provoked by North Carolina's deregulation of private education will be of importance in the determination of those issues. Education,

---

249. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (quoting James Madison's Memorial and Remonstrance Against Religious Assessments, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947)).

250. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

251. See text accompanying notes 6-10 *supra*.

straddling the wall of church-state separation, must not suffer the fate portrayed centuries ago:

> Humpty Dumpty sat on a wall,
> Humpty Dumpty had a great fall;
> All the King's horses and all the King's men
> Couldn't put Humpty Dumpty together again.

Cynthia Wittmer West