AN APPROACH TO MUTUAL RESPECT: THE
CHRISTIAN SCHOOLS CONTROVERSY

RICHARD E. SHUGRUE*

Let us hear the conclusion of the whole matter. Ecclesiastes
12:13

The tension between church and state is most glaringly high-
lighted in the issues surrounding education.¹ The question of prayer
in the public schools, while resolved in the Supreme Court of the
United States over twenty years ago,² created a constitutional itch for
more than a hundred years³ and is, once again, front and center in

* Professor of Law, Creighton University School of Law; B.A. 1959, University
of Nebraska; J.D. 1962, University of Nebraska; Ph.D. 1968, University of Nebraska.

1. The literature is virtually so vast that a comprehensive bibliography would
consume pages, volumes. A representative, albeit miniscule, list of reflections on the
topic might include: RELIGIOUS LIBERTY IN THE CROSSFIRE OF CREEDS (F.H. Littel ed.
1976); R.E. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN
AMERICA (2d ed. 1980); R.J. REGAN, PRIVATE CONSCIENCE AND PUBLIC LAW, 149-84
(1972); Anastaplo, The Religion Clauses of the First Amendment, 11 MEM. ST. U.L.
REV. 151 (1981); Bainton, State Regulation of Private Religious Schools and the State's
Interest in Education, 25 ARIZ. L. REV. 123 (1983); Crokenberg, An Argument for the
Constitutionality of Direct Aid to Religious Schools, 13 J.L. & EDUC. 1 (1984); Drake,
Attempted State Control of Religious Schools: Congress Shall Make No Law Inhibiting
the Free Exercise of Religion, 7 OHIO N.U.L. REV. 954 (1980); Esbeck, Establishment
Clause Limits of Governmental Interference with Religious Organizations, 41 WASH.
& LEE L. REV. 347 (1984); Gaustad, Church, State, and Education in Historical Per-
spective, 26 J. CHURCH & STATE 17 (1984); Kurland, The Supreme Court, Compulsory
Education, and the First Amendment's Religion Clauses, 75 W. VA. L. REV. 213 (1973);
Stocklin-Enright, The Constitutionality of Home Education: The Role of the Parent,
the State and the Child, 18 WILLIAMETTE L.J. 563 (1982); Whitehead & Conlan, The Es-
stablishment of the Religion of Secular Humanism and Its First Amendment Implica-
tions, 10 TEX. TECH L. REV. 1 (1978); Worthing, The State and the Church School: The

(1962); see also Stone v. Graham, 449 U.S. 39 (1980) (holding that a law mandating the
posting of the Ten Commandments on the wall of each public school classroom vio-
lated the establishment clause); Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), peti-

3. The earliest reported case involving religious practices in public schools was
Donahoe v. Richards, 38 Me. 379 (1854); see McCormick v. Bart, 95 Ill. 263 (1880);
Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Billard v. Board of Educ., 69 Kan.
53, 76 P. 422 (1904); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W.
782 (1905); Nesse v. Hum, 2 Ohio N.P. 60 (1894); Curran v. White, 22 Pa. C. 201 (1898);
Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908). These cases often represented at-
ttempts by Catholic parents to prevent the Protestantization of the public schools
through compulsory recitations of prayer or the reading of verses from the King
James Version of the Bible.
the national consciousness. The issue of state aid to parochial education has endured from at least the time of the Northwest Ordinance as persistently nettlesome. Whether they take on the shadings of a tuition tax credit or other form of aid, transportation for parochial students in publicly-owned vehicles, special education programs, or


7. "Economic and statistical analysis shows that it is possible to construct a tuition tax credit or voucher system, which reimburses families for part of the expense of sending their children to private schools, without aiding religion." NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 1045 (2d ed. 1983).

8. Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947) (articulating the so-called "child benefit" doctrine, whereby it is postulated that transportation to all children is a general service and not an aid to religion).

9. Meek v. Pittenger, 421 U.S. 349, 367-73 (1975), invalidating part of a Pennsylvania program which would have provided guidance, remedial and therapeutic services to parochial school students by public employees. The use of state employees was held to be insufficient to guarantee a purely secular program. Id. In Wolman v. Walter, 433 U.S. 229, 246-47 (1977), the Court held that remedial services could only be given to parochial students away from their own schools. See also Wheeler v. Barrera,
use, on the mirror side of the problem, of public school facilities for proselytizing, church-state educational issues are the stuff of political polemics and legislative and judicial maneuvering.

On the one side of the debate stand the establishment clause interpretations. On the other side stand the free exercise clause decisions. That the Supreme Court of the United States has developed doctrines for applying these principles cannot honestly be disputed. That the doctrines are variegated and in flux is apparent, with some growing degree of support from the political, legal, and religious bleachers, not to mention the Court itself, for the proposition that, at least for several decades, the high court has misinterpreted the religion clauses and their scope. That a Supreme Court inclined to an historical analysis might overturn a couple of generations of

417 U.S. 402, 419 (1974), modified, 422 U.S. 1004 (1975) (holding that state officials are not prohibited from attempting to provide comparable services under federal law to all students).


13. The first amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The free exercise clause was held applicable to the states, through the fourteenth amendment, in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). The establishment clause was incorporated in Everson v. Board of Educ., 330 U.S. 1, 8 (1947). To be constitutional, a law challenged under the establishment clause must: (1) have a secular purpose; (2) have a primary secular effect; and (3) not excessively entangle government with religion. See, e.g., Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510 (1982) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).


15. See, e.g., Marsh v. Chambers, 103 S. Ct. 3330, 3336 (1983), where the three-part establishment clause analysis was ignored in favor of historical analysis. In his dissenting opinion, Justice Brennan found the challenged practice of engaging and paying for a legislative chaplain in violation of all three prongs of the traditional test. Id. at 3337-38.


17. The Supreme Court decisions since Everson v. Board of Educ., 330 U.S. 1 (1947) have demonstrated that the Court does not consider the deliberations of the
first amendment development should be neither shocking nor out of the realm of possibility.\textsuperscript{18}

That the Court could view the traditional wall of separation of church and state,\textsuperscript{19} so fundamental a doctrine in the development of modern first amendment jurisprudence, as just so much the figment of the imagination of liberal historians and jurists relying on the musings of aging founding fathers, such as Thomas Jefferson and James Madison,\textsuperscript{20} is quite conceivable. This, after all, is the tenor of the decisions allowing a Christmas creche on public property\textsuperscript{21} and the employment of a sectarian chaplain, paid for out of tax dollars,
for the Nebraska Unicameral legislature.\textsuperscript{22}

On the establishment clause side of the first amendment, since 1971 the three-part analysis fashioned in \textit{Lemon v. Kurtzman}\textsuperscript{23} has served as the generally accepted rubric. The elements are: 1) the challenged state activity must have a secular purpose; 2) it must have as its primary effect neither the advancement nor the inhibition of religion; and 3) it "must not foster 'an excessive government entanglement with religion.'\textsuperscript{24}

This analysis has been neither uniformly nor universally applied by the judiciary.\textsuperscript{25} It has, however, survived well over a dozen years although it appears that an additional element has been added. That element would tolerate the recital of strictly ceremonial prayers at some civic functions\textsuperscript{26} and the establishment of displays, such as Christmas creches, to commemorate holidays which have both a secular and a sectarian purpose.\textsuperscript{27}

On the free exercise clause side of the first amendment, particularly as it impacts on the relationship between fundamentalist Christian schools on the one hand and the right of the state to control all elements of elementary and secondary education on the other, predictability is less certain. As shall become apparent, the United States Supreme Court has not resolved this delicate issue except in the narrowest of factual contexts.\textsuperscript{28} It has provided a framework, albeit teetering, by which church-state conflicts over fundamentalist education conflicts might be resolved. Those rules and the possibility of a peaceful resolution are the stuff of this article.

Both state courts and the federal judiciary have, over many years, developed themes regarding the right of the state to operate schools and the right of parents to resist compulsory education or establish their own educational processes. Some of these themes echo free exercise concerns;\textsuperscript{29} others are grounded in liberty theories arising from the fourteenth amendment and have nothing to do with the religion clauses. Though the latter parental rights have been long disregarded,\textsuperscript{30} the fact of the matter is that the religion clause rights

\textsuperscript{22} Marsh v. Chambers, 103 S. Ct. 330 (1983).
\textsuperscript{23} 403 U.S. 602 (1971).
\textsuperscript{24} \textit{Id.} at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
\textsuperscript{25} See note 6 supra.
\textsuperscript{26} Marsh v. Chambers, 103 S. Ct. at 336.
\textsuperscript{27} Lynch v. Donnelly, 52 U.S.L.W. at 4318.
\textsuperscript{28} Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (holding compulsory attendance law invalid under free exercise clause).
\textsuperscript{29} \textit{Id.}
and parental liberty have become confused,\textsuperscript{31} perhaps destabilizing the foundations of modern fundamental liberties.

For this reason, it is most useful to trace the development of the right of the state to exclusive control over education, without regard to the source of the right as precedent for modern cases; if the right perdures, its existence does not depend on refinement of other rights. The impact of the free exercise clause on educational matters must then be sifted through to see where this nation has come.

Martha McCarthy has written: "It is well established that parents have some control over \textit{where}, but not \textit{whether}, their children are educated."\textsuperscript{32} To this might be added that we do not yet know, under the Constitution, the extent to which parents have control over \textit{how} their children are to be educated. For, as shall be shown, the seminal decision in \textit{Wisconsin v. Yoder}\textsuperscript{33} only seemed to carve out an exception to compulsory education laws for those who live lives segregated from the main stream of modern American society. The nature of the segregation from society seems to be the boon granting the exemption,\textsuperscript{34} but can that ever be enough under the appropriate interpretation of the first amendment?

During the last century, the courts of a number of states were called upon to resolve the question of who held the ultimate authority over the education of children. These cases arose in a number of

\textsuperscript{31} While \textit{Pierce} was not grounded in the religion clauses, but in the fourteenth amendment alone, it now seems to have "become accepted that the decision . . . was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation." School Dist. v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting). See also the provocative observation of George Anastaplo:

"I consider dubious the landmark case in this field, \textit{Pierce}. . . . I suspect that those rights rest ultimately upon the right to emigrate (as a kind of natural right). . . . But whatever status the right to emigrate may have, it does not necessarily require parental rights in this form (such as the right to establish one's own schools) for those who choose not to emigrate.

Anastaplo, supra note 1, at 177. Later cases seem to ignore the basic right of parents to rear their children and focus only on rather traditional, that is, theism-based, free exercise concerns. See State v. Kasuboski, 87 Wis. 2d 407, —, 275 N.W.2d 101, 105 (Ct. App. 1978), where it is held that \textit{Pierce} is a charter for the rights of parents to direct the religious upbringing of their children and that a \textit{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 sectarian considerations.

\textsuperscript{32} McCarthy, \textit{Church and State: Separation or Accommodation}?, 51 HARV. EDUC. REV. 373, 381-82 (1981).

\textsuperscript{33} 406 U.S. 205 (1972).

\textsuperscript{34} \textit{Yoder} stressed the long tradition of separatism from society by the Old Order Amish:

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

\textit{Id. at 222} (citing \textit{Meyer v. Nebraska}, 262 U.S. 390, 400 (1923)).
contexts. Sometimes, the issue was whether a public school could coerce a student to participate in programs of a religious nature. Sometimes, the question was whether the parent had a right, as against a determination of the public school authorities, to withdraw the child from specific educational programs.

What is clear from an examination of these cases is that, regardless of the nature of the factual situations, the courts were considering fundamental rights other than freedom of religion (or freedom from it). This stems from the fact that incorporation of the first amendment against state action through the fourteenth amendment did not take place until long after the decisions were handed down. Of course, state courts were always free to apply their own state constitutions and their respective protections of religious freedom, but this prerogative was not the focus of the decisions.

A detailed analysis of one of these cases will illustrate the point that long before religious considerations were present in the education-private rights tension, courts were finding that the citizen-parent could not be deprived of his or her basic right to control the upbringing of children. This was the focus of the early United States Supreme Court cases on fundamental parental rights as well.

In the Nebraska case of *State ex rel. Sheibley v. School District No. 1*, the student's father sought to compel restoration of his daughter to the public school after the school dismissed her in response to his demand that she be excused from the study of grammar. He also sought to have her restored to the public school after she was suspended. The Nebraska Supreme Court, rejecting the right of a parent to require that the interests of other children be sacrificed for the interest of his child, granted that the public school officials could classify pupils and determine their proficiency. But the court did not stop its inquiry there. It asked: "Now who is to determine what studies she shall pursue in school: a teacher who has a mere temporary interest in her welfare, or her father, who may rea-

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35. See note 3 supra.
38. See, e.g., *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 73, 144 N.W. 1039, 1044 (1914) (focusing on parents' right to control the upbringing of their children without discussing the state or federal constitutions).
39. See note 30 supra.
40. 31 Neb. 552, 48 N.W. 393 (1891).
41. Id. at 554, 48 N.W. at 394.
42. Id.
43. Id. at 555, 48 N.W. at 394.
sonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?"  

4 The court concluded that the right of the parent "to determine what studies his child pursues is paramount to that of the trustees or teacher."  

45 It held that no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, "and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable."  

46 It concluded: "There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school."  

47 The court did not refer to any provision in the state or federal constitutions in reaching its conclusion on the question of parental right of control.

Several years later, the Nebraska court was once again asked to resolve the question of parental control of the child's public school education.  

48 The case arose, not in the context of a complaint about denial of free exercise or establishment, but over a compulsory domestic science course.  

49 The court held that the right of the parent to make a reasonable selection from the prescribed course of studies which shall be carried by his child in the free public schools "is not limited to any particular school of that class or to any particular grade in any of such public schools. If the right exists at all, it exists at all times and in every grade."  

50 Acknowledging that compulsory school laws had been sustained as against parental challenge, the court nevertheless added that "[w]herever education is most general, there life and property are the most safe, and civilization of the highest order."  

52 The court concluded: "[I]n this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home."  

53 Within a decade, another Nebraska practice was before the courts, this time in the case of Meyer v. Nebraska, which involved

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44. Id. at 556, 48 N.W. at 395.  
45. Id.  
46. Id. at 557, 48 N.W. at 395.  
47. Id.  
49. Id. at 64, 144 N.W. at 1040.  
50. Id. at 72, 144 N.W. at 1043.  
51. Id. (citing State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901)).  
52. Id. at 73, 144 N.W. at 1043.  
53. Id. at 74, 144 N.W. at 1044.  
54. 262 U.S. 390 (1923).
not a public school but the teaching of German in a parochial school. The teacher had been convicted of violating a law prohibiting the teaching of a subject in a foreign tongue.\textsuperscript{55} The Nebraska Supreme Court sustained the conviction, holding that the statute did not conflict with the fourteenth amendment and concluding that the obvious purpose of the law was that the English language be the mother tongue of all children raised in the state.\textsuperscript{56}

The United States Supreme Court focused on the due process clause of the fourteenth amendment for its analysis. It noted that states enforce their right of control over the education of the young through compulsory laws.\textsuperscript{57} It added that "[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. . . . Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him . . . are within the liberty of the Amendment."\textsuperscript{58} The Court concluded that the means adopted exceeded the limitations of the power of the state.\textsuperscript{59}

The decision is significant for what it said in regard to compulsory education. It held that states legitimately adopt such schemes to foster their rightful interests in the acculturation of the young.\textsuperscript{60} It acknowledged in passing that education is only possible when schools are conducted by specially qualified people.\textsuperscript{61} The decision is grounded in the old-fashioned substantive due process of law doctrine, and Justices Holmes and Sutherland dissented on the basis that there was a rational basis for the law, and while it might be unwise or improvident, it was within the power of the legislature.\textsuperscript{62}

Just two years later, the Court was faced with an Oregon law requiring every student to be educated in a public school. In \textit{Pierce v. Society of Sisters},\textsuperscript{63} the Court reaffirmed its decision in \textit{Meyer}, holding that the "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

\textsuperscript{55} \textit{Id.} at 391. The statute provided that no person shall in any school teach any subject to any person in any language other than English. 1919 Neb. Laws 249.
\textsuperscript{56} Meyer v. State, 107 Neb. 657, 661-62, 187 N.W. 100, 102 (1922).
\textsuperscript{57} 262 U.S. at 400.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.} at 403.
\textsuperscript{60} \textit{Id.} at 401-02. The difficulty, as will be seen, is that each state is free to draw its own model as to what is essential for the acculturation of the young. What is essential (thus arguably meeting the compelling interests of Nebraska) may not be part of the model in Iowa.
\textsuperscript{61} \textit{Id.} at 400.
\textsuperscript{62} \textit{Id.} at 403 (Holmes and Sutherland, JJ., dissenting). The text of the dissent is printed in the accompanying case of Bartels v. Iowa, 262 U.S. 404, 412 (1923).
\textsuperscript{63} 268 U.S. 510 (1925).
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."^64

This decision came before the era of "incorporation" of rights through the fourteenth amendment.^65 Whether the issues would have been more sharply focused on first amendment grounds or have forestalled generations of conflict over the conflicting claims of parents and school officials to educate children can never be known.

What is known is that even before the Pierce decision, the Court had distinguished between the right to believe (which is absolute) and the right to act (which may always be subject to control in the face of legitimate state interests).^66

By the second half of this century, there was no doubt that private schools could exist and none that parents had a duty to comply with state compulsory attendance laws; the state, at least, was conceded the right to monitor and regulate private education.^67

Compliance with state school laws appeared as an issue in many jurisdictions. In 1960, for example, Washington's state supreme court held: "Under the compulsory school attendance law, the legislature delegated to the district or county superintendent the authority to determine the minimum standards for a private school, in order that, in the exercise of this discretion, attendance at a qualified private school may be approved."^68 A few years later, the Kansas Supreme Court upheld a statute which required that all children attend a school, public or private, "taught by a competent instructor, in which all instruction shall be given in the English language only . . . for such period as the public school of the district . . . is in ses-

^64. Id. at 535.
^65. See note 37 and accompanying text supra.
^66. In Reynolds v. United States, 98 U.S. 145 (1879), the Court upheld the constitutionality of a law prohibiting plural marriages. Chief Justice Waite wrote that "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." Id. at 164. Utah was not yet a state so the issue of incorporation was not present. The free exercise clause would not protect against the ban on action even though the conduct might be central to a religion, unless the law assailed the belief itself. Id. at 166. See also Church of Latter Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890) (upholding a law against bigamy); L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 31 (1975):

[The first amendment] protects the free exercise of religion, a word which surely connotes action . . . [I]f only belief is encompassed, the amendment offers little help to the nonbeliever, for, as the common law adage had it, the Devil himself knows not the thoughts of man, and all the nonbeliever need do is to keep his thoughts to himself.

Old Order Amish parents complained that the requirement that students be schooled until they reach sixteen violated their first amendment rights.

The Kansas court denied them relief, refusing to make any exception, and holding that:

[T]he natural rights of a parent to the custody and control of his child are subordinate to the police power of the state and may be restricted and regulated by municipal law providing minimum educational standards. . . . The question of how long a child should attend school is not a religious one. No matter how sincere he may be the individual cannot be permitted upon religious grounds to be the judge of his duty to obey laws enacted in the public interest.

During the last two dozen years, the United States Supreme Court has established principles balancing state law against free exercise of religion. While reaffirming the principle that government may never interfere with religious belief, it was not until 1961 that it squarely dealt with a free exercise claim. In *Braunfeld v. Brown*, the Court was faced with the case of a Sunday closing law opposed by members of the Jewish faith. While no opinion mustered a majority, it was held that the economic burdens imposed on the Orthodox Jews were not violative of the free exercise clause, even though they would be prohibited from engaging in buying and selling on Sundays. Even though this burden was severe, Chief Justice Warren wrote, it was the indirect effect of a law with a secular purpose.

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74. Chief Justice Warren wrote for four members of the Court, id. at 600-10; Justice Frankfurter wrote a concurring opinion joined by Justice Harlan, id. at 610 (printed in the accompanying case of McGowan v. Maryland, 366 U.S. 420, 459-461 (1961)); Justice Brennan dissented on this issue, 366 U.S. at 610-16, as did Justice Stewart, id. at 616.


76. 366 U.S. at 606-07.
law. First, the plaintiff had the burden of demonstrating a real burden on his exercise of religion; and, second, the burden would be sustained only if the state was pursuing an overriding secular goal by a least restrictive alternative.

Two years later, in *Sherbert v. Verner*, a majority held that state unemployment benefits could not be denied to a Sabbatarian who refused to work on Saturday. This time, Justice Brennan wrote for a seven-member majority and continued to employ a two-part balancing test.

First, plaintiff had the burden of showing that there was a substantial burden on the exercise of her religion because of the denial of benefits. Second, the burden’s validity could survive only if it was found essential to a compelling state interest, outweighing the impairment of free exercise. Permeating the test was the idea that the means chosen by the state were the least restrictive ones.

The significant decision in *Wisconsin v. Yoder*, holding that the State of Wisconsin could not require members of the Old Order Amish Church to send their children to public school after the eighth grade, employed a two-part balancing test. The first part of the analysis required a finding that the parents’ determination not to send their children to school was based on religion. The Court found this to be so, predicating its conclusion on the following factors:

1. There was a shared belief by an organized group rather than a personal preference;
2. The belief related to theocratic principles and interpretation of religious literature;
3. The system of belief pervaded and regulated daily life;

77. *Id.* at 607.
78. *Id.*
80. 374 U.S. at 399. (Harlan and White, JJ., dissenting). Brennan had dissented in *Braunfeld*. See *supra* note 74.
81. 374 U.S. at 403.
82. *Id.*
84. *Id.* at 215-17. Reaching the result, the Court was unanimous, but two separate opinions were filed by three justices. *Id.* at 237 (Stewart and Brennan, JJ., concurring); *Id.* at 241 (Douglas, J., concurring). Justices Rehnquist and Powell did not participate.
85. 406 U.S. at 215-17.
86. *Id.* at 216.
87. *Id.* at 215-17.
88. *Id.*
(4) The system of belief and resulting lifestyle had existed for some 300 years.89

The Court did not clarify which of these factors determines the existence of a religion or a religious belief. Thus, it is conceivable that if the test is whether a significant burden on free exercise of religion must be shown, it can be shown absent any of these elements when there is a stipulation or assumption of sincerity.90 The test, after all, did not hinge on how unusual the Amish were but whether they sincerely held their beliefs.91

In the prior two cases, the Court had relied on the notion of a compelling state interest. In Yoder, however, the Court held that the attendance law could be applied to the Amish if "the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."92 This could be said, then, to shunt aside the compelling interest test and to advance a more open balancing test.93

The state's interest in the children's health and well-being would overcome a claim where the religious exercise was detrimental to the youngsters.94 That, however, was not shown in Yoder. And yet,

89. Id.
90. In Nebraska ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 811, 301 N.W.2d 571, 576-77 (1981), the court "assumed" the sincerity of the defendants' religious beliefs, though distinguished the practices involved from those in Yoder. Cf. State v. Shaver, 294 N.W.2d 883, 891-95 (N.D. 1980), in which the state did not dispute the sincerity of the defendant's religious beliefs and convictions but concluded that the challenged law did not require the parents to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See also Quaring v. Peterson, 728 F.2d 1121, 1123-28 (8th Cir. 1984), in which the plaintiff did not share her belief in a literal interpretation of the Second Commandment with members of her sect, the Court nevertheless finding that "that does not lessen the religious nature of her convictions." Id. at 1124.
92. 406 U.S. at 214.
93. This, however, may have been abandoned in Thomas v. Review Bd., where the Court held that a burden upon religion exists when the state conditions a benefit's receipt on abandonment or modification of religious behavior or violation of beliefs. 450 U.S. at 717-18.
while Yoder did not echo the compelling interest language from Sherbert v. Verner, the Court did say: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."95 One author has concluded that a "general reliance by the state on its broad powers will not be sufficient to enact laws which infringe on a person's religious belief or religiously motivated actions."96

A careful reading of the Sherbert/Yoder decisions reveals that there are actually four sequences in any analysis of a state scheme allegedly impinging upon free exercise clause claims.97

First: A determination is made whether the allegedly religious activity poses some actual threat to public safety, peace, or order.98 Thus, if the religion denied the right to a vaccination during a plague99 or required the throwing of virgins into a chasm, the analysis would stop and the state's police power would prevail. Assuming no such threat, one moves to the second stage.

Second: Does the legislation actually infringe on the free exercise guarantee? This question can only be answered if the court decides: a) whether the activity is central to the doctrinal basis;100 and b) whether the belief from which the act springs is sincerely held.101 If these elements are found, one moves on.

Third: The burden is on the state to demonstrate either a compelling interest or an interest of the highest order not otherwise served.102

Fourth: If the state has met its burden, then it must show that the regulation is the least restrictive alternative.103

vaccinations as a precondition to school attendance, McCartney v. Austin, 57 Misc. 2d 525, —, 230 N.Y.S.2d 188, 200 (Sup. Ct. 1968).


96. Drake, supra note 1, at 959.


98. Sherbert, 374 U.S. at 403.


102. Sherbert, 374 U.S. at 406.

103. Id. at 407.
The second stage of analysis in this process can be satisfied by stipulation.¹⁰⁴ The state can agree that the beliefs are sincerely held, thus obviating the agonizing task of probing into the deepest reaches of the challenger's soul.¹⁰⁵ But stipulation as to sincerity of religious belief may not end the inquiry. The centrality of the belief must also be established.¹⁰⁶ This probably means that the belief-centered conduct is so much at odds with the statutory scheme challenged that unless the state “gives”, the religion loses its vitality, its uniqueness, that which differentiates it from other religions.

Here, it is conceivable that a court can run into several problems. It might, for example, get entangled in weighing the beliefs of witnesses for the religion so as to reach a conclusion as to whether the governmental conduct really has an impact on the religious tenets.¹⁰⁷ In State v. Shaver,¹⁰⁸ for example, the North Dakota Supreme Court concluded that there was really nothing in the doctrine of the church challengers which was in conflict with the state’s accreditation scheme. These people, the court concluded, really did not object to having certified teachers working in their schools, or, put another way, those who worked in the schools could be certified without doing violence to the doctrine of the church.¹⁰⁹

Likewise, a court may conclude that because the adherent had not used the “correct” formula in stating his or her beliefs that would otherwise be in conflict with the legislative or regulatory scheme, centrality did not exist.¹¹⁰ At least one justice of the North Dakota

¹⁰⁴. See id. at 399 n.1; see also note 84 and accompanying text supra.
¹⁰⁵. See Quaring v. Peterson, 728 F.2d 1121, 1124 n.3 (8th Cir. 1984); State ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 812, 301 N.W.2d 571, 577 (1981), wherein judges could not resist the temptation to debate obscure religious tenets. For a better view, see Arkansas Day Care Ass'n v. Clinton, 577 F. Supp. 388, 394 (E.D. Ark. 1983), stating, “when it comes to the legitimacy of religious beliefs or the sincerity of those who espouse those beliefs, courts should be wary of questioning that which is not readily understood.” But see United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) (stating that “courts must be ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of theirs”); State v. Rivinius, 328 N.W.2d 220, 225 (N.D. 1982) (stating that “a showing of a sincerely held religious belief is necessary to prevent a limitless excuse for avoiding all unwanted legal obligations and the group's word cannot automatically be accepted if a religious exemption is at issue”). See also Wilson v. Block, 708 F.2d 735, 740 (D.C. Cir.), cert. denied, 104 S. Ct. 371 (1983) (holding that the free exercise clause protects only beliefs or practices that are “rooted in religion”).
¹⁰⁷. See Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980) (holding that native Americans had not shown that the flooding of a valley would centrally interfere with convictions shared by an organized group).
¹⁰⁹. 294 N.W.2d 883 (N.D. 1980). The state did not dispute the sincerity of the religious beliefs. Id. at 891.
¹¹⁰. Id. at 887, 895.
¹¹¹. Id. at 897-900.
Supreme Court was obviously confronted with a record replete with testimony that an adherent “thought” or “felt” a certain way, rather than having stated “such-and-such is the doctrine of my church.”

Finally, taking its cues from the exception carved out by the Supreme Court of the United States in Yoder as reading that exemptions may be tolerated only if the religious group lives apart from society and has done so for three centuries, it may conclude that “new religious practices” will never qualify for protection under the free exercise clause. The court may be swayed by the fact, for example, that in certain cases parents had, until the last school year, sent their children to public schools or that teachers had, in a former state, submitted to certification.

Such judicial gymnastics inevitably place the courts in the proscribed position of weighing the nature of religious belief. To be sure, the courts are free to do this where the belief system is “obviously” a sham; there is abundant precedent against engaging in such choices in all other contexts, however. It is only a false reliance on Yoder which seems to tolerate such defining of true religion. As a matter of fact, the very task of engaging in such inquiries, particularly where both challenger and defender of the state school scheme stipulate as to religious sincerity, may involve not the free exercise clause but the apparently more settled establishment clause.

This is not to say that the court ought not make a determination,

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111. Id. at 900-01 (Sand, J., concurring).
112. This would include individuals with deep personal beliefs not rooted in theism. See State v. Andrews, 65 Hawaii 289, —, 651 P.2d 473, 474-75 (1982). This is so, despite the fact that draft exemptions are measured by whether one has sincere beliefs rather than purely pragmatic motives for seeking relief. Welsh v. United States, 398 U.S. 333, 342-43 (1970) (plurality opinion by Black, J.).
116. See generally Freeman, supra note 91 (analyzing the meaning of the term "religion" in the Constitution).
117. This is so because the Court may engage in analysis which excessively entangles church and state and demonstrates a preference for one type of religion as against another. See Buchanan, Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values, 28 UCLA L. Rev. 1000, 1022-25 (1981). The coagulation of free exercise and establishment issues can be seen if one accepts the notion that advancing religion obviously constitutes establishment. Inhibiting religion means prohibiting its free exercise. But inhibiting religion constitutes violation of the establishment clause. Pfeffer, Freedom and/or Separation: The Constitutional Dilemmas of the First Amendment, 64 Minn. L. Rev. 561, 566 (1980). Looked at another way, the syllogism is as follows: Major premise: Any law that inhibits religion violates the establishment clause. Minor premise: Any free exercise violation inhibits religion. Conclusion: Any law that violates the free exercise clause also violates the establishment clause. If the Court isn't saying this, what is it saying? Riggs, supra note 16, at 301.
where sincerity is not stipulated, as to whether the objection is religion-based or predicated on some personal philosophical objection to public school education.\textsuperscript{118} Indeed, while such objections may involve other values emanating from \textit{Meyer} and \textit{Pierce} (not to mention fundamental rights under state constitutions),\textsuperscript{119} the inquiry is appropriate in free exercise cases.

The case law sharply differentiates between the schools which rely on sincerely held religious beliefs, on the one hand, and those which are founded because of some philosophical difference with public school policy. By and large, failure to advance a genuine religious predicate for the school's independence will result in the court's rejection of the sincerity/centrality test burdens.\textsuperscript{120}

While it is true that for a free exercise claim to survive as against state law a religious belief requires something more than a purely secular philosophy or personal belief, courts have approved an expansive definition of religion. That test is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.\textsuperscript{121}

It is beyond dispute that the state has an interest in education and that the interest has been acknowledged ever since \textit{Pierce} and \textit{Meyer} (and long before, as far as the state courts are concerned). Should this, however, be taken to mean that the state has a compelling interest in the \textit{form} of education outlined by state education laws and fleshed out by state education officials through the regulatory process? The cases typically end their inquiry by declaring that the state's compelling interest burden is met because a) previous courts have declared that states have an abiding interest in seeing that children are prepared for life, and b) the challenged legislative scheme demonstrates that this is the approved method for meeting

\textsuperscript{118} State v. Moorehead, 308 N.W.2d 60, 64 (Iowa 1981); State v. Kasuboski, 87 Wis. 2d 487, —, 275 N.W.2d 101, 105 (Ct. App. 1978).
\textsuperscript{119} Kentucky State Bd. for Elem. & Sec. Educ. v. Rudasill, 589 S.W.2d 877, 879 (Ky. 1979).
\textsuperscript{120} See State v. Shaver, 294 N.W.2d 883, 891-95 (N.D. 1980).
\textsuperscript{121} In Thomas v. Review Bd., the Court noted that it was not within the judicial function and competence to inquire whether a claimant correctly perceives the command of his faith. "Courts are not arbiters of scriptural interpretation." 450 U.S. at 716. See United States v. Seeger, 380 U.S. 163, 187-88 (1965).

The year after \textit{Thomas} was decided, the Court ruled on \textit{United States v. Lee}, 455 U.S. 292 (1982). Here an Amish employer refused to pay social security taxes, claiming it would violate his religion. The Court noted that not all burdens on religion are unconstitutional; a state may justify a limit on religious liberty by showing it to be essential to accomplish an overriding governmental interest. \textit{Id.} at 257-58. Justice Stevens concurred, disagreeing with the strict scrutiny approach, and suggesting that an objector ought to shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability. \textit{Id.} at 291-62.
This sort of logic, unhappily, does not make a lot of sense. It presumes that there is some coherent, universally recognized philosophy of education afoot in the country which, as a matter of federal constitutional law, permeates all educational systems and schemes. Nothing, of course, could be further from the truth.

Furthermore, it presumes that the rational choices of the state legislatures—rational, in the sense that some appropriate motive or purpose was either expressed for the system of education by the lawmakers or supplied by the courts—are inevitably sufficient to overcome free exercise claims. While it is true that very few free exercise claims have been successful, that should not be taken as an independent finding of the rationality, or even the appropriateness, of state educational programs.

The state's interest in education is presumed to be a compelling one. As demonstrated, appeals are made to language in Meyer and Pierce, as well as Brown v. Board of Education, Lemon v. Kurtzman, Board of Education v. Allen, and, finally, Yoder, in which the Court noted that providing public schools ranks at the very apex of the function of a state.

Courts then leap from the "compelling interest in education" to a presumption that if the state is to 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 function.

State educational schemes are, it seems, as varied as possible. Some states impose only minimal requirements. Others have

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122. See, e.g., State ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 816-17, 301 N.W.2d 571, 578-80 (1981) (noting that states have an interest in preparing their youth for life and that certification of teachers is a reliable method of assuring such preparation).

123. This is particularly true in the arena of challenges to education laws, where such schemes are usually upheld unless they intrude overwhelmingly into the operation of the school (which may, in fact, be an establishment clause matter), State v. Whisner, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 765 (1976), or unless a state protection underlies the invalidation, Kentucky State Bd. for Elem. & Sec. Educ. v. Rudasill, 589 S.W.2d 877, 879 (Ky. 1979).


125. 403 U.S. 602 (1971) (discussed at note 6 supra).

126. 392 U.S. 236 (1968) (discussed at note 6 supra). See, however, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), where the Court did not find education to be a fundamental right. As close as it came was to say that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the freedom of speech or voting] . . . we have no indication that the [low taxation system] . . . fails to provide each child with an opportunity to acquire the basic minimal skills . . . ." Id. at 36-37.


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drawn plans which intrude into virtually every minute of the school day.129 Others, like Kentucky,130 by constitutional mandate allow the parent to make the decision as to how a child will be educated. There is no "American policy" on education, one of the last bastions of state supremacy, at least insofar as accreditation, curriculum, and attendance are concerned.

In addition to meeting the compelling interest standard, the state has the burden of demonstrating that the regulatory scheme it has adopted is the least restrictive means to achieve the desired goal.

This means that it is not enough just to demonstrate that the state's program is in place and, generally, working. It is well-settled that neither financial exigencies nor administrative convenience is sufficient to meet the least restrictive alternative test.131 What, then, is required in cases involving a state's educational law? Must the state demonstrate that no other method than the one chosen by it can serve the end of the compelling interest? Can assertion alone of compliance with the standard ever be enough? Or must the challenger be prepared to advance some alternative which is less burdensome than the one advanced by the state, with the state then having rebuttal privileges to show why the challenger's alternative is not fungible?132

Post-Yoder judicial development has not, unfortunately, provided

\[129. \text{See, e.g., State v. Whisner, 47 Ohio St. 2d 181, } \rightarrow, 351 \text{ N.E.2d 750, 762-63 (1976) (outlining the standards found in Ohio's education department). Cf. Neb. Admin. R. tit. 92, ch. 14 (1983) (rules for certification of schools). The variety of regulations of private schools alone is evidenced by the fact that there is no consensus about their definition; only five states have mandatory accreditation for them; 28 states have voluntary accreditation programs while 32 have voluntary or mandatory approval programs and six states have school advisory committees for the institutions. The range of requirements for such schools—from courses, to instruction hours, to examinations, to curricular reporting—further illustrates that there is no single "compelling" interest within the states. Devins, State Regulation of Christian Schools, 10 J. LEGIS. 351, 360-61 n.67 (1983).}


\[132. \text{Judge Posner has urged that the burden be on the challenger to be willing, at least, to show that he has a better idea than the state advanced. Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1035 (7th Cir. 1982). There, the rule at issue was a ban on wearing head coverings during basketball games. The state agency advanced a safety rationale. The judge wrote: "If the plaintiffs can totally allay the state's safety concern at zero, or practically zero, cost to them, they must do so. Otherwise the state's concern, even if relatively slight, will be a compelling interest in relation to the (non)burden on the plaintiffs' religious freedom." Id.}
well-defined answers to these troublesome questions. On the contrary, the Nebraska crisis was precipitated, in part, because the solutions were not well-conceived in the light of apparent jurisprudential norms.

In August of 1977, the Faith Baptist Church of Louisville, Nebraska, began operating the Faith Christian School. Its curriculum was the Accelerated Christian Education program, consisting of instructional information and self-test questions. The student works at his or her own pace and, after attaining a score of eighty or better in a test given by a supervisor, moves on to the next step. The function of these supervisors is to monitor, not to teach. The instruction is Bible-centered. The program in mathematics, for example, contains simple addition and subtraction problems interspersed with biblical sayings.

Notwithstanding requests from state and local education officials, the school operators refused to furnish reports indicating the names and addresses of the students and indicated that they would not seek approval of the teaching program (even though they were informed that it would be approved). No accredited teachers were employed, and no approval was sought for the operation of the school.

The school’s operators maintained that the school was simply an extension of the ministry of the church, over which Nebraska had no authority to approve or accredit. The pastor of the Faith Baptist Church, Reverend Everett Sileven, stated that a Christian education is mandated by the Bible. Teaching, then, is a way of life and not


135. *State ex rel. Douglas*, 207 Neb. at 805, 301 N.W.2d at 574. Note that not only do the adherents of the religion believe that Bible-centered education is mandated but that public schools "are overrun with an increase in crime, drug and alcohol addiction, teacher assaults, vandalism, and disrespect for authority and property," that secular humanism is the basic philosophy of the public educational system and that the State Department of Education, not having a Christian philosophy, cannot judge the philosophy of the school. Id.

136. *Id.*

137. *Id.*

138. NEB. REV. STAT. § 79-207 (Reissue 1981) requires the furnishing of third day reports containing names and addresses of all students enrolled in the school.

139. *Id.* Dueteronomy 6:6-7 (Today's English Version) states: "Never forget these commands that I am giving you today. Teach them to your children. Repeat them when you are at home and when you are away, when you are resting and when you
simply a five-hours-a-day, five-days-a-week proposition.\textsuperscript{140}

Reverend Sileven and his followers believe that public schools are overrun with crime, drugs, alcohol, teacher abuse, and disrespect for authority and are grounded in the philosophy of secular humanism.\textsuperscript{141} Moreover, Sileven and his followers maintain that the state is neither capable of judging the philosophy of the school nor empowered to inspect the school since the state has no right to inspect God's property.\textsuperscript{142} The state sought to enjoin the operation of the school because there had not been compliance with state school laws.

It has been shown that the resolution of a case involving assertion of a free exercise claim as against a state law arguably designed to meet its compelling interest in education involves more than mere acceptance of the state's avowal that such an interest exists and, often, more than mere acceptance of the challenger's claim that adherence to the law will interfere with religious beliefs or practices. Even where sincerity and centrality are conceded, some semblance of balancing is still indicated, for the law in question may indeed serve overwhelming state interests. Then again, it may advance no more than rational interests in uniformity through an efficient and workable plan.

The fact of the matter is that, despite the lack of agreement as to the real (as opposed to perceived) extent of the state's interest in education\textsuperscript{143} and the fact that states have not been put to hard proof to are working.” \textit{Proverbs} 22:6 states: “Teach a child how he should live, and he will remember it all his life.” \textit{Ephesians} 6:4 states: “Parents, do not treat your children in such a way as to make them angry. Instead, raise them with Christian discipline and instruction.”

\textsuperscript{140} 207 Neb. at 806, 301 N.W.2d at 574.

\textsuperscript{141} Id. at 805, 301 N.W.2d at 574. \textit{See generally} E. SILEVEN, \textit{DEAR LEGISLATOR} (1983); H. ROWE, \textit{THE DAY THEY PADLOCKED THE CHURCH} (1983).

\textsuperscript{142} 207 Neb. at 806, 301 N.W.2d at 574.

\textsuperscript{143} That courts will not dictate a hard and fast standard for determining appropriate education is related to their reluctance to intervene in educational decision making. The United States Supreme Court has indicated that it lacks the specialized knowledge and that experience counsels against the premature interference with the informed judgments made at the state and local levels. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973). The following year, in Milliken v. Bradley, 418 U.S. 717 (1974), the Court stated:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential . . . to the maintenance of community concern . . . . Thus, in [Rodriguez, 411 U.S. at 50], we observed that local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation and a healthy competition for educational excellence.”

\textit{Id.} at 741-42. \textit{See also} Board of Educ. v. Rowley, 458 U.S. 176, 183 (1982) (upholding a denial of a sign language interpreter for deaf students); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (holding that states are free to determine the proper standards for edu-
demonstrate that their educational programs meet the least restrictive alternative standard, the states almost always prevail. Such was the state of juridical confusion when, in January, 1981, the Nebraska Supreme Court decided the Faith Christian School matter. Once again, the state prevailed. The majority opinion was written by Judge William Hastings. Judge Hastings reviewed the *Meyerkorth v. State* decision, which had held that there is nothing arbitrary, unreasonable, or unconstitutional relating to the qualifications of teachers to teach in the parochial schools of Nebraska or with the requirements of compulsory education and attendance.

He read *Yoder* as recognizing the *Meyerkorth* principle that the state has a high responsibility for the education of its citizens. While stressing the differences between the duration and apparent intensity of the Amish in *Yoder* from the declarations of the Baptists, Hastings seemed most influenced by the concurring opinion of Justice White, who had noted the Supreme Court's recognition of the legitimacy of the state's concern for enforcing minimal educational standards. Judge Hastings' opinion did not even refer to the least restrictive alternative branch of free exercise clause analysis.

If the opinion is to be read as saying that the Nebraska scheme is so minimal that no alternative could be less restrictive than it contemplates, that may, in fact, determine the outcome but only if the state has assumed its share of the burdens process during the litigation.

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146. It is noteworthy that *Meyerkorth* stated that the right of religious freedom "is not involved in this case." *Id.* at 908, 115 N.W.2d at 596. The court there went on to hold that the statutes "are not arbitrary or unreasonable nor an invalid attempt to exercise the police power of the State. . . ." *Id.* The case also cited extensively and with approval, Commonwealth *v. Beiler*, 168 Pa. Super. 462, *—*, 79 A.2d 134, 137 (1951), which had held constitutional the application of compulsory attendance to members of the Old Order Amish religion whose way of life and objections to the law replicate Amish in *Yoder*.


148. It did, however, refer to Application of Urie, 617 P.2d 505 (Alaska 1980), which involved an objection to the requirement that a bar applicant must have a degree from an accredited law school. Applying that rationale to the minimum teacher requirement in Nebraska, Judge Hastings wrote that it was "neither arbitrary nor unreasonable" and that the state "has a compelling interest in the quality and ability of those who are to teach its young people." 207 Neb. at 816-17, 301 N.W.2d at 579.

149. Sherbert *v. Verner*, 374 U.S. 398, 406-07 (1963); "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice. . . ." *Id.* at 406. "[I]t would plainly be incumbent upon the [state] to demonstrate that no
Judge Hastings referred to the proposal that testing be substituted for compliance with the law. The problem with that solution, he wrote, "is that it sometimes comes too late," and the child can waste that year.\textsuperscript{150}

Chief Justice Krivosha concurred in part and dissented in part.\textsuperscript{151} He rejected the defendants' biblical argument, maintaining that under his views of ancient Rabbinic principles, "one may not ignore the secular law of the country in which one lives."\textsuperscript{152}

He agreed that a state may impose reasonable regulations requiring curricular approval, disclosure of attendance, and testing. He strongly disagreed with the requirement that elementary and secondary teachers possess a bachelor's degree before a school may satisfy the compulsory attendance law, saying that he found nothing in either the statutes or logic "which compels a conclusion that one may not teach in a private school without a baccalaureate degree if the alternative forms of regulation would combat such abuses without infringing First Amendment rights." \textit{Id.} at 407 (footnote omitted). Even if an exemption were allowed, the exempted class would not be afforded so great a competitive advantage that such a requirement would have rendered the entire statutory scheme unworkable. \textit{Id.}

\textsuperscript{150} 207 Neb. at 817, 301 N.W.2d at 579. \textit{Cf.} State v. Shaver, 294 N.W.2d 883, 897 (N.D. 1980) (questioning the validity of standardized tests). If the testimony giving rise to the conclusion came from educational officials, they are guilty of several errors. First, a year in an educational environment is not "wasted," even if the child were to fail an examination. The process of socialization has taken place. See B. Osman, \textit{Learning Disabilities: A Family Affair} ch. 4 (1979). One can be placed in a class with an accredited teacher and not achieve because the broad variables of achievement might intervene. W. Kennedy, \textit{Child Psychology} ch. 4 (1971). The eminent psychologist Carl Rogers, in a lecture at Harvard, said that the emphasis in teaching is a misguided one. "Just as in therapy the client cures himself, so in education the student must do the learning himself—he is not to be taught. . . . [To accomplish education's aims] the teacher, like the therapist, must possess not some special pedagogical skills but rather 'certain attitudinal qualities' that function 'in the personal relationship between the facilitator and the learner.'" B. Bugelski, \textit{The Psychology of Learning Applied to Teaching} 289 (2d ed. 1971).

If the issue is whether a child's achievement is rewarded by advancement to the next grade (or identified early and forced to repeat a failed subject immediately), the testing method is surely no worse than a public school system in which a student may be held back from promotion only if the parent agrees, and then only at certain stages, or in which a failing student makes up the course in summer school. There is nothing in Nebraska's education law which compels periodic responses by parents to unsatisfactory work of the child.

Given the reliance on standardized testing by school officials, is there not some inconsistency in their rejecting them as an adequate assessor of achievement? See Neb. DEPT' OF EDUC. REGS. tit. 92, ch. 14, § 004.01G (1983), mandating utilization of a competency measure which assesses mastery in reading, writing and arithmetic, such as the Nebraska Assessment Battery of Essential Learning Skills. The rule cautions that normative or comparative standards do not describe a mastery and therefore may not be substituted for this requirement.

\textsuperscript{151} 207 Neb. at 818, 301 N.W.2d at 580.

\textsuperscript{152} \textit{Id.} at 819, 301 N.W.2d 580-81.
children are to be properly educated." Krivosha noted that under the holding, Eric Hoffer could not teach philosophy in a grade school and Thomas Edison could not teach the theories of electricity.

The problem with the decision in *Faith Baptist Church* is that it virtually ignores the modern doctrine handed down by the United States Supreme Court, murky though it may be. It ignores the least restrictive alternative admonition, takes for granted the existence of a compelling state interest in teacher certification, and, in effect, assumes that the central issue in *Yoder* was not the depth and centrality of the religious belief but the superannuation and isolation of the sect.

The United States Supreme Court's rejection of the appeal meant that the Nebraska court's decision controlled not only the outcome of the Faith Baptist litigation but stood as the definitive interpretation of the constitutionality of the state's education scheme as it affected Christian schools.

From the time of the initial confrontation between the Faith Baptist Church and the state officials, the stalemate was not resolved for many years. Other actions were brought by or against the schools operated without approval. The church was padlocked under court...
order,\textsuperscript{159} some of the parents were jailed for contempt of court, and national attention was focused on the small community of Louisville.\textsuperscript{160}

Reverend Sileven left the state where a warrant was out for his arrest and was making his case throughout the nation.\textsuperscript{161} The legislature did not take any action which would resolve the Christian schools controversy.\textsuperscript{162}

In late 1983, Governor Robert Kerrey appointed a task force to study the issues surrounding the problem and make recommendations to him as to how it might be resolved.\textsuperscript{163} The task force determined that it would conclude its work by early in the 1985 legislative session, which was to begin in January. The confrontational politics existing between the Faith Baptist members, both incarcerated and out of the state, and the state officials,\textsuperscript{164} the persistent media attention,\textsuperscript{165} and signals from some members of the legislature that a solution would be worked out\textsuperscript{166} all seemed to compel this determination.

\textsuperscript{159} Preachers Wage A Holy War in Nebraska, Rocky Mountain News, Dec. 12, 1983, at 7, col. — (Denver, Colo.).


\textsuperscript{162} In 1983 alone, at least three bills, L.B. 160, L.B.45, an L.B. 46, 88th Leg., 1st Sess., impacting on the issue were indefinitely postponed.

\textsuperscript{163} Kerrey Names 4 to Study Christian-Schools Issues, Omaha World-Herald, Dec. 13, 1983, at 26, col. 5. None of the individuals was involved in the Christian school movement or the educational establishment. The chair of the group was Robert Spire of Omaha, a former president of the Nebraska State Bar Association. His fellow task force members included Alcurtis Robinson, an officer of Mutual of Omaha, Sally Knudsen of Lincoln, a former teacher and the wife of a past president of the state bar, and this author. Id. The task force had no official standing or budget. Spire literally inundated the membership with materials ranging from educational excellence to the church-state issues involved. Spire was later appointed Attorney General of the State of Nebraska by Governor Kerrey when Paul Douglas resigned.


\textsuperscript{165} See notes 159, 160, and 161 supra.

\textsuperscript{166} 2 Ideas Proposed to Calm Christian School Conflict, Omaha World-Herald,
While other proposals were being worked out, the Spire Commission report was to become the theoretical foundation of Nebraska's accommodation between the state interest in universal education and the right of the fundamentalist parents to control the rearing of their children.

The report of the task force was filed with the Governor on January 26, 1984, and a special meeting of the legislature's Education Committee was convened so that it could be presented with the findings and recommendations.

The report concluded that the state has an obligation to assure that children receive a good education. Acknowledging that the state carried out its obligation through a systematic program of laws and regulations dealing with certification, courses, materials, and equipment and that these clearly impacted upon the notion of compulsory education, health, safety, and fire regulations, the report noted that some Christian schools objected to the state regulations on religious grounds. Other schools, though operated by religious groups, have traditionally observed the entire package of regulation, approval, and accreditation.

The task force indicated that the conflict between the religionists

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167. Four bills impacting on the issue were to be introduced during the session, L.B. 668, L.B. 771, L.B. 928, and L.B. 994, the omnibus education bill. 88th Leg., 2d Sess., 1984.


169. Id. at 3-4.

170. See NEB. REV. STAT. §§ 79-101 to -3011 (Reissue 1981 & Cum. Supp. 1984). See also Nebraska Department of Education, Rule 14, a comprehensive ordering of virtually every element of school operation, including such subjects as definitions of the school year, the school day, a teacher (who, under it, has to be a "certificated employee" regularly employed for the instruction of pupils), methods of application for approval and a detailed scheme of violations, probation and nonapproval. The rule provides the details of developmental skills goals for course work and calls for "criterion-referenced competency measures" but cautions that normative or comparative standards do not describe mastery and therefore may not be substituted for the requirement. It mandates the existence of a comprehensive library-media program and requires such detail compliance as, "[a]t least fifty percent of the textbooks used by the elementary school for regular classroom instruction shall have a purchase date within five years previous to the school year in which the textbooks are being used. . . ." Roughly parallel requirements for high schools exist in the rule, including a provision that, where ninth grade is included in the secondary instruction, course work must be provided in at least two of the areas of homemaking, industrial arts and/or general shop, crafts and typing.

and the educational policy of the state could be resolved by creating an exemption from state requirements which involved these elements:

1. If all parents of children attending a church-related private school so elect, testing of their children shall be acceptable as an alternative to curriculum, teacher certification, and related requirements for the school. These tests should be of a standardized nature recognized by the State Department of Education and educators as proper indicators of student progress. They should be administered annually by the County Superintendents. If the average test scores in each content area and at each grade level of all students enrolled in a school are at least equal to such average test scores of students in Nebraska public schools (or, if scores are not available for Nebraska public school students, then the nation as a whole), the school attended by these students need not meet the State curriculum, teacher certification and related requirements.

2. Parents who elect this alternative shall make a written representation to the State that (a) their religious beliefs dictate this choice, (b) they consent to a testing procedure for their children, and (c) they will supply regularly to the state evidence that their children are (1) meeting State mandatory school attendance requirements and (2) receiving a structured program of education which satisfactorily covers all basic areas of study included in State curriculum standards and is conducted with physical facilities and instructional equipment and materials comparable to State standards. If the parents (1) fail to comply with these procedures, (or their representations to the State are inaccurate), or (2) their children test below the prescribed averages, then their children will be considered to be in violation of State mandatory school attendance requirements.

3. Health, safety, and fire regulations for church-related private schools shall remain as they are.

4. The result of this exemption is this: Church-related private schools, for reasons of the religious conscience of the parents of the children attending them, may operate without seeking a license or obtaining approval from the State. The parents of the students involved shall (1) submit their children to a testing procedure, and (2) report directly to the State compliance with mandatory attendance, basic curriculum and related requirements.172

Why did the panel reach these conclusions? Having no legal status or institutional bias, it could reach conclusions based not only on

the law in the abstract but also considering the volatility of the is-
ues, the apparent willingness of the parties to reach accomodation,
and the best interests of the greatest number of Nebraskans.\textsuperscript{173}

It posited that the Nebraska teacher certification procedures vi-
olated the first amendment free exercise rights of the Christian
schools.\textsuperscript{174} The conclusion, of course, had to take into consideration
the state supreme court's result in \textit{Faith Baptist},\textsuperscript{175} but the panel was
free to look at the problem in the context of conclusions unreached
by the court.

The Faith Christian School is not the only fundamentalist insti-
tution in the state; its system of education was not adopted by every
school. It was clear to the panel that the state high court had not an-
alyzed the critical element in the \textit{Sherbert-Yoder} model.\textsuperscript{176} Were the
United States Supreme Court to be faced with a better framed case
involving sympathetic parties, it would have no alternative, assuming
fidelity to the reasoning in \textit{Thomas v. Review Board}\textsuperscript{177} coupled with a
fair application of \textit{Sherbert} and \textit{Yoder}, but to strike down the Ne-
braska scheme, both under the compelling interest and least restric-
tive alternative means rationale (not to mention the sincerity-
centrality model).\textsuperscript{178}

Politics is the art of the possible. A legislature that is convinced
that there is nothing wrong with its selected system of regulating ed-
ucation that a little capitulation from the advocates of free exercise
of religion would not cure would never move off dead center. Lawmakers who could be convinced that litigation would not stop
and that defiance is the God-ordained order of the day, by and from
the operators of church schools, might be willing to heed the kind of
advice proffered by the likes of the North Dakota Supreme Court
that legislation was the way to resolve the conflict.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{173} See Letter from Robert M. Spire to task force members (Jan. 3, 1984) (on file with \textit{Creighton Law Review}).
\item \textsuperscript{174} \textit{The Report, supra} note 168, at 3.
\item \textsuperscript{175} See notes 145-54 and accompanying text \textit{supra}.
\item \textsuperscript{176} \textit{id.}
\item \textsuperscript{177} \textit{Thomas v. Review Bd.}, 450 U.S. 707 (1981).
\item \textsuperscript{178} This may presume the adherence to the \textit{Sherbert-Yoder-Thomas} line of cases, a willingness to look at state educational policies where non-isolated sects are con-
cerned and an acknowledgment that teaching is, indeed, a central ministry of the
church. It may also presume an ultimate acknowledgement that establishment values
are implicated in any intrusion into the work of a church and that when parental
rights and free exercise rights are on one side of the scale, the balance should be for
the schools challenging state regulation. \textit{See Tribe, American Constitutional Law}
\textsection 14-13 (1978).
\item \textsuperscript{179} See \textit{State v. Shaver}, 294 N.W.2d 883 (N.D. 1980) "The courtroom is simply not the best arena for the debate of issues of educational policy and measurement of edu-
cational quality." \textit{Id.} at 900. \textit{See also Yoder}, 466 U.S. at 235 (noting that courts must move "with great circumspection" in this area).
\end{itemize}
The Spire group observed that its suggested accommodation "meets the religious issue without unreasonably interfering with the ability of the State to assure a competent education for Nebraska children and to establish standards for education."\textsuperscript{180} The report to the Governor recognized that "[its] suggestions are simply one approach."\textsuperscript{181} Others, sensitive to the competing rights, could suffice.

The underlying theory of the Commission's conclusion was that the state's interest is, in truth, in the result of education and not of the process by which the result is obtained.\textsuperscript{182} It recognized that some other states have mandatory certification requirements which they may or may not enforce,\textsuperscript{183} and still others exempt church-related schools from some or all state regulations.\textsuperscript{184}

Nebraska's options were to do nothing, leaving state regulation as it was in 1984 (and have the ultimate resolution made by the courts), to exempt Christian schools and children attending them from all state regulations of any kind, or to change in some way the manner in which the state regulates private schools.\textsuperscript{185} The Spire panel's conclusion was a measured selection of the third; that is, some modification of the present Nebraska system for regulating Christian schools is appropriate, and the parents of children attending these schools must be willing to demonstrate to the state satisfactory educational achievement by their children. The selected remedy arises from two significant principles: 1) the concept of accountability, meaning that the parent, not the school, is accountable to the state; and 2) the principle of the first amendment's free exercise clause.\textsuperscript{186}

Four conclusions unfold from the task force's view of the freedom:

1. The state has a "compelling interest" in the education of Christian school children.
2. [That interest] must be exercised with as little interference as possible with the religious claims of the Christian schools.
3. The State's "compelling interest" is in the actual

\textsuperscript{180} The Report, supra note 168, at 3.
\textsuperscript{181} Id.
\textsuperscript{183} See Letter from Larry David Bartlett, Administrative Consultant to Governor of Iowa, to William Hoppner, Governor's Office, Nebraska (Jan. 9, 1984) (on file with Creighton Law Review) (noting that Iowa's mandatory certification requirements, IOWA CODE §§ 257.25, 299.24 (1983), are minimally enforced).
\textsuperscript{185} The Report, supra note 168, at 16.
\textsuperscript{186} Id. at 23.
achievement of the students, not in the means by which that achievement is obtained.

(4) When confronted by a First Amendment free exercise of religion claim, it is an unconstitutional interference with religion for the State to insist on controlling the educational process (unless it can be shown that the proposed controls are essential to the desired educational achievement). Rather, the State must limit its interest to the actual achievement of students unless and until it is shown (which it has not been) that reasonable achievement cannot be obtained without State control of the process.187

After seven years of unrelenting controversy, the 1984 Nebraska Unicameral attempted to resolve the state's Christian schools controversy.188 Following passage of a compromise law, the State Board of Education adopted a rule which implemented the right of parents who elect to send their children to unapproved church-affiliated schools the means by which to do so without defying the law.189

The student population in Nebraska's Christian schools is but a tiny fraction of all school age children in the state.190 Fewer than a score of such schools operated in the state at the beginning of the 1984 legislative session. But the controversy over the continued presence of the schools, in defiance of statute, regulation, and judgments of the courts, was far out of proportion to the miniscule number of individuals directly affected by the debate.191

At stake in the heated dialogue which had shown a hot spotlight on Nebraska was not only the significant church-state issue but also the right and power of the majority to direct the education of the young, the political potency of the educational establishment,192 the credibility of the Governor,193 and the rule of law.

The educational establishment regarded itself as the sole voice of expertise in educational matters and wished to preserve the right to

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190. The Report, supra note 168, at 35. Education Department figures quoted show 269,103 students in approved public schools, 36,478 in approved private schools and 227 in 14 unapproved schools. Id. By the fall of 1984, the number of unapproved schools had risen to 56, 43 of them being home schools. About 440 children were instructed in the schools. State Shrugging its Shoulders, Lincoln Journal, Oct. 8, 1984, at 10, col. 1.
191. See note 158-66 and accompanying text supra.
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decide who and what should be taught and how. Compromise was out of the question, for education in a prescribed curriculum controlled by certified teachers was the sine qua non of competence. That a group could advance the notion that another form of education was good for citizenship was as much heresy as acceptance by the fundamentalists of the proposition that modern public education was suitable for the children of God.

The "exile" of Reverend Sileven, the jailing of some of his followers, the persistence of the Christian school movement and, equally, of law enforcement officers to halt the operation of unapproved schools resulted in a form of stasis. If the matter was to be resolved, the forty-nine members of the Unicameral would have to do the job.

The legislature hammered out a compromise which was hailed and railed against. It, nevertheless, became the law of the state of Nebraska.

Legislative Bill 928, which was signed into law by Governor Kerrey on April 10, 1984, empowers the State Board of Education to establish rules and regulations governing standards and procedures for the legal operation of all schools in the state. In turn, all such schools are required either to comply with the accreditation or approval requirements of law or, for those schools electing not to meet them, to furnish evidence that they offer a program of instruction leading to the acquisition of "basic skills in the language arts, mathematics, science, social studies and health."

Rules governing such private parochial schools could include visitation and regular achievement testing of such schools' students. A focal point of the legislation was the establishment of parent representatives for such schools, with whom arrangements for visitation


199. Id. (citing the visitation provisions of § 79-328).
are to be made and through whom evidence of compliance with the law shall be made to appropriate authorities.\textsuperscript{200}

In a significant departure from the Spire Commission report, the law provides that the results of such testing "may be used as evidence that such schools are offering instruction in such basic skills, but shall not be used to measure, compare, or evaluate the competency of students at such schools."\textsuperscript{201} The law nevertheless retains language empowering the Board to institute a statewide system of testing the degree of achievement and accomplishment of all the students within the state's school systems if it determines such testing would be advisable.\textsuperscript{202}

Central to the scheme for operating the private parochial schools is the provision treating the election by the parents or legal guardians of all the students attending such schools that "the requirements for approval and accreditation [violate their] sincerely held religious beliefs."\textsuperscript{203} An authorized parent representative must "at least annually, submit to the commissioner of Education, information necessary to prove"\textsuperscript{204} that such school is:

1. Meeting minimum requirements relating to health, fire, and safety standards prescribed by state law and rules and regulations of the State Fire Marshall;\textsuperscript{205}

2. Reporting attendance pursuant to section 79-201;\textsuperscript{206} and

3. Maintaining a sequential program of instruction designed to lead to basic skills in the language arts, mathematics, science, social studies, and health.\textsuperscript{207}

The parent representative report must contain information that the school not only offers the courses of instruction required by subsection 79-1701(2) but also section 79-328.\textsuperscript{208} Those subject areas are the same.

Finally, the report must state that:

[T]he parents or legal guardians have satisfied themselves that individuals monitoring instruction at such school are qualified to monitor instruction in the basic skills as required both by this sub-section and section 79-328 and these individuals have demonstrated an alternative competency to

\textsuperscript{200} Id.
\textsuperscript{201} Id. at § 79-328. Cf. The Report, supra note 168, at 22 (suggesting that a standardized test be used to evaluate the progress of students in unaccredited schools).
\textsuperscript{202} Id. at § 79-328(5)(e).
\textsuperscript{203} Id. at § 79-1701(2)(a).
\textsuperscript{204} Id. at § 79-1701(2)(b).
\textsuperscript{205} Id. at § 79-1701(2)(d).
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at § 79-1701(2)(b). Cf. NEB. REV. STAT. § 79-328 (setting forth powers and duties of the State Board of Education).
monitor instruction or supervise children pursuant to sub-
sections (2) to (4) of this section.\textsuperscript{209}

School monitors are not required to meet certification requirements
as prescribed by the education law. They must, however, either take
appropriate subject matter components of a nationally recognized
teacher competency examination designated by the State Board of
Education or offer evidence of competence to provide instruction in
the basic skills pursuant to informal methods of evaluation to be
developed by the Board:\textsuperscript{210} "Such evidence may include educational
transcripts, diplomas and other information regarding the formal ed-
ucational background of the monitors."\textsuperscript{211}

The results of either the testing or the informal evaluation
would be transmitted by the parent representatives and could be
used as evidence of whether the schools are offering adequate in-
struction.\textsuperscript{212} Such evidence, however, shall not be used to prohibit
the school from employing such a monitor. That a monitor who is
tested fails to attain a score equal to or exceeding both the state or
national average may be by itself sufficient proof that the school does
not offer adequate instruction.\textsuperscript{213}

The demonstration of competency to monitor instruction in such
a school in no way constitutes the granting of a license, permit, or
certificate to teach in Nebraska.\textsuperscript{214}

A school which elects not to be approved or accredited and does
not meet the above requirements shall not be deemed a school for
purposes of section 79-201,\textsuperscript{215} and the parents or legal guardians of
children attending such school shall be subject to prosecution pursu-
ant to such section or any statutes relating to habitual truancy.\textsuperscript{216}

A parent representative who transmits information required
under the law knowing it to be false shall be guilty of a Class IIIA
misdemeanor, and a person knowingly giving false information to a
parent representative, knowing that such information is intended to
be transmitted to the Board, shall also be guilty of a like offense.\textsuperscript{217}

The law finally forbids publicly funded colleges or universities within
the state to prohibit admission of children educated in such parochial

\textsuperscript{209} Id. at § 79-1701(2)(d).
\textsuperscript{210} Id. at § 79-1701(3).
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at § 79-1701(4).
\textsuperscript{215} Section 79-201 is the compulsory education law of the state, requiring attend-
ance of children between the ages of seven and sixteen and defining the school term
and required instructional hours.
\textsuperscript{216} NEB. REV. STAT. §§ 79-207, -212, -312 (Reissue 1981).
\textsuperscript{217} Id. at § 79-1701.01 (Cum. Supp. 1984).
schools if the child is qualified for admission as shown by testing results.\textsuperscript{218}

The regulation adopted by the State Board of Education contains only six requirements.\textsuperscript{219} A statement of objections and assurances is required from parents or guardians of children attending a church exempt school. A parent representative must file a statement containing the names and ages of the children attending the school and is required to add or delete new or withdrawn students.\textsuperscript{220}

Second, prior to each school year, the parent representative must submit to the Commissioner a calendar for the school year, a list of the names of instructional monitors (including their educational accomplishments, schools, and years attended, and summary of prior teaching or monitoring experience), or a score on the National Teachers Examination,\textsuperscript{221} in addition to the above information.\textsuperscript{222}

The representative will submit a chart or summary showing the scope and sequence of the program of instruction designed to lead to basic skills. This will include a list of classes or courses, the grade levels being included, and the names of the monitors responsible for each.\textsuperscript{223}

Third, the Commissioner, upon receipt of the communication from the representative, will acknowledge it and send a copy to the county superintendent in which the school is located.\textsuperscript{224}

Fourth, if the required material is not received, the State Department will notify the county superintendent and county attorney that the school has not met the requirements and shall not be deemed exempt.\textsuperscript{225} This may subject parents or guardians to prosecution under truancy provisions.

Fifth, visits to the school may be arranged to verify information.\textsuperscript{226} Denial of access shall be cause for the Department to deter-

\begin{itemize}
  \item 218. \textit{Id.} at § 79-1701.
  \item 219. \textit{Id.} at § 002.
  \item 220. \textit{Id.} at § 003.
  \item 222. \textit{Id.} at § 003.
  \item 223. \textit{Id.} at 002.
  \item 224. \textit{Id.} at 005.
  \item 225. \textit{Id.} at 006.
  \item 226. \textit{Id.} at 007.
\end{itemize}
mine that the school is not meeting requirements relating to the program of instruction on basic skills, meaning that the school shall not be deemed exempt.

A final provision relates to student testing. When the Department, to verify information required to be submitted, deems it necessary to have regular achievement testing conducted, officials will contact the parent representative and a test, a time, and a procedure shall be mutually designated and established. Denial of testing, so long as pursued in this matter, shall be cause for the Department to determine that the school is not meeting requirements relating to instruction in the basic skills, and the school shall not be deemed exempt under the law.

A far more comprehensive rule had been proposed earlier in 1984 but was not adopted. It had focused on such elements as assurance of compliance with health and fire regulations and, for the monitors, passage of the Pre-Professional Skills Test with a score of fiftieth percentile or above and recommendations as to character and ability to work with children. A method for review of the evidence and appeals from a determination of failure to qualify was included in the draft.

Supporters of the Christian schools had objected to the proposed rule, stating that it gave the State Board of Education power to grant an exemption, a power not given under L.B. 928. Whether a revised statute or new rules could ever satisfy all elements of the Christian schools controversy cannot be known. It is clear that some festering suspicion remains and may only be ameliorated by the passage of time and good faith compliance with the new

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227. Id. at 008. It had been the position of the Christian schools that their students were progressing at least as well as the average Nebraska school student, as measured by achievement tests. State ex rel. Douglas v. Faith Baptist Church, 207 Neb. at 806-07, 301 N.W.2d at 574-75. See also Letter from Cecil R. Reynolds, Ph.D. to Richard Moore (Sept. 4, 1982) (on file with Creighton Law Review). Reynolds, a psychological consultant, stated that he had observed the administration of the California Achievement Test. The result showed the Faith Christian students to be scoring seven, nine, and twelve months ahead of comparable public school groups in language, mathematics, and reading respectively.


230. See Draft, Rule 13, tit. 92, ch. 13 (June 18, 1984).

231. NEB. ADMIN. R. tit. 92, ch. 13, at 004, 005.

232. Id. at 006.

exemption scheme. The lack of consistent, thoughtful, and respectful development of the law of church and state in America. The ferment in the legal arena is but a part of the overall problem identified by Jeffrey Hadden who wrote: "There is great confusion, even anguish, in America today about the relationship between religion and politics." This tension is focused on the question of the right of fundamentalist Christians to operate schools for their children versus the right of the state to ensure that every child receives an adequate education.

One cannot predict whether the judicial system, divided as it has been through the years over the conflicting claims, can resolve the problem. Its resolution of other church-state conflicts has been less than satisfactory. The United States Supreme Court's reluctance to hear and decide cases involving the operation of schools has been apparent and contributes to a national confusion.

Thus, society is left with its right to demand that lawmakers come to grips with the conflicting elements and attempt, with what sketchy guidance there is, to resolve the dispute, to protect the interests at stake, to traverse the minefield of church-state relations.

Is it too much to expect that when the state advances its interests in education for all youngsters that it articulate with precision what those interests are? That the state reject bromides and palliatives to support its view? Is it too much to hope that our educa-

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235. Inconsistent, since it is difficult to reconcile, for example, the decision in Sherbert v. Verner, 374 U.S. 398 (1963), with the Sunday closing laws of just two years earlier, McGowan v. Maryland, 366 U.S. 420 (1961); lacking thought, in that, for example, "there is no accepted definition of 'religion' for constitutional purposes and no satisfactory definition is likely to be conceived." Johnson, supra note 156, at 821; and lacking respect, since, for example, one gets the distinct impression from Wisconsin v. Yoder, 406 U.S. 205, 219 (1972) that if a religion is not old, its values "traditional," it is not entitled to protection.
239. See note 143 supra.
240. The Supreme Court, in Brown v. Board of Educ., 347 U.S. 483 (1954), held that "[i]n 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." Id. at 493. In Wisconsin v. Yoder, 406 U.S. 205 (1972), it said that "some degree of education is necessary to prepare ci-
tors, barricaded as they have been against the tirades of a dissatisfied public, formulate educational goals clearly?241

Is there room within our system for any acknowledgement by the fundamentalists that the state has an interest in education with which no amount of free exercise rhetoric can interfere?

If my analysis of the first amendment issues at stake in the Christian schools controversy is correct, the state has significant burdens to assume in advancing its right to control the Christian schools. To date, its compelling interest burden has usually not been met or asserted with unconvincing sweep and lack of particularity.242 Its least restrictive alternative burden has been established, at best, by reference to its current reasonable regulations.243

Fundamentalist parents, on the other hand, have not been without fault. Their intransigence may, for all we know, be protected by the first amendment; their tactics have nevertheless served to alienate political leaders and wide segments of the public. The Nebraska case illustrates this latter point.244

Hostility to the form and substance of public education from the fundamentalists is not an isolated phenomenon. Their tracts question the very foundation of civic education, the motives and methods of public educators.245 Their claim to a right to alternative forms of education for their young is a belief from which they are not likely to be turned.

The host of problems associated with the churches and education

zens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. . . . [and] education prepares individuals to be self-reliant and self-sufficient participants in society." Id. at 221. These broad strokes say nothing of how much or how, much less, what, education is to be mandated.

A gloomier view of American education is expressed in R. FARSON, BIRTHRIGHTS 98 (1974): Not only have students failed to learn the subject matter pertinent to self-government, but in the authoritarian and arbitrary system of American education they have not experienced it either. Compulsory education and the autocracy fostered by it has robbed children of any sense of what independence of action and freedom of choice might be. School has made the concept of participation in the decisions that affect them so remote to students that the real lesson in compulsory education is that one cannot be trusted to govern oneself.


243. See id. at 813-14, 301 N.W.2d at 578.


would never be resolved by a compromise law in one midwestern state. The insistence by some on the return of God to the public schools,\textsuperscript{246} on the elimination of the alien dogma of secular humanism,\textsuperscript{247} and on the possibility of the fundamentalist schools being within reach of the fisc for support of their non-majoritarian programs\textsuperscript{248} are persistent and gnaw at the fabric of domestic tranquility. The burgeoning of the fundamentalist school movement in the country\textsuperscript{249} poses a threat at least to the traditional acceptance that public schools do a decent, acceptable job.

The Nebraska experience demonstrates that a compromise, if not wholly satisfactory, can nevertheless be hammered out. It can be refined without the continuous resort to litigation which marshalled the adversaries against one another.

The proposal of the Spire Commission for student testing,\textsuperscript{250} even if accelerated to alleviate fears about wasted months or years, was acceptable to those whose religious prerogatives were under siege.\textsuperscript{251} That proposals to accomplish effective evaluation of teachers—even though they not be accredited by the state—can, likewise, be made is within the realm of human possibility.

The failure to articulate precisely the state’s interest in educating its young, the failure to acknowledge that there is at least a thread of protection for the diverse, minority religious views sincerely held by Americans, and the failure to recognize that any government regulation intruding on fundamental rights threatens all fundamental rights are dangers so grave as to be avoided at all costs.


\textsuperscript{247} See Whitehead & Conlan, \textit{supra} note 1, at 54-61 (discussing the “ramifications and implications of secular humanism”).


\textsuperscript{249} White, \textit{Gospel Truth: Fundamentalists Open Schools With Classes Run Without Teachers}, Wall St. J., Nov. 2, 1984, at 1, col. 1 (noting that Accelerated Christian Education, Inc. expects to sell $23 million worth of school materials to 4,500 fundamentalist churches for use by 335,000 students, one-third of the total fundamentalist-Christian school population).

\textsuperscript{250} The \textit{Report}, \textit{supra} note 168, at 2, 19-23. For a brief analysis and critique of standardized testing as employed in schools, see G. Weber, \textit{Uses and Abuses of Standardized Testing in the Schools} (1978).

Nebraska's experience illustrates the hysteria which can arise when people of good will are not willing to reason calmly, to lower the decibel level, to respect the rights of every citizen.