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Pluralism, Private Schools and Public Policy

E. Vance Randall

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> At present opinion is divided about the subjects of education. All do not take the same view about what should be learned by the young, either with a view to plain goodness or with a view to the best life possible . . . Goodness itself, to begin with, has not the same meaning for all the different people who honour it . . . it is hardly surprising there should also be difference about the right methods of practising goodness.
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> —Aristotle[1]

I. INTRODUCTION

By the end of November in 1965, all of Iowa and most of the nation had learned of the confrontation between the Amish—or Plain People—and the local officials in rural Buchanan County. Media accounts, complete with pictures and commentary, recounted the efforts of the school superintendent, the sheriff, and the county attorney to bring children attending unapproved Amish schools to the local public school. The scenes were pregnant with emotion. Some children ran for the cover of the cornfield at the approach of the local authorities while others began sobbing as they huddled in the corner of the schoolhouse. Weeping mothers embraced their youngsters, and the superintendent kept trying to loosen the grip of a crying boy from his desk. Many of the Amish people were arrested and ordered to pay fines. When their personal funds were exhausted, much of their property was auctioned off by local officials to pay for the assessments levied against them.[2]

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1. THE POLITICS OF ARISTOTLE 333-334 (Ernest Barker ed. & trans., 1981).
2. Donald A. Erickson, *Showdown at an Amish Schoolhouse: A Description*

During the early morning hours of October 18, 1982, fifteen carloads of deputies and state troopers under the direction of the sheriff arrived at the Faith Baptist Church in Louisville, Nebraska. They had a court order to secure the building with padlocks to prevent its continued use as the site of an unapproved school. The doors were to be opened only during worship hours. Inside were some 85 persons conducting a "prayer vigil" in behalf of their pastor, Reverend Mr. Everett Sileven, who had been jailed for operating an unapproved school. When the worshippers refused to leave, they were carried out by the law enforcement officials and the building was padlocked. Earlier, the pastor had asked God to convert or exterminate the civil authorities of Nebraska. A law enforcement officer had suggested the use of incendiary grenades as one means to compel compliance with the law. Numerous arrests were made and the tensions were not reduced until the governor and state legislature intervened.[3] To the credit of both sides, a compromise was eventually reached which allowed private schools sponsored by religious organizations to be approved by the state using less stringent criteria.[4]

A. Historical Overview

The degree of state intervention in the educational processes of the public schools has always been problematic. It becomes even more so when the school is not an agency of the state but a private endeavor. "Few issues," notes Ravitch, "have been as tortuous for our political system as trying to define the appropriate relation between the state and nonpublic schools."[5] A high degree of state intervention which prescribes the scope and nature of private schools runs the risk of eliminating cultural diversity, innovative educational practices and experimentation. Extensive and intrusive state regulation, while well-

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and Analysis of the Iowa Controversy, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 15-59 (Donald A. Erickson ed., 1969).

One state supreme court justice characterized these actions by public officials as "gestapo tactics." State v. Yoder, 182 N.W.2d 539, 550 (Wis. 1971), *cert. granted* 402 U.S. 994, *aff'd* 406 U.S. 205 (1972), (Heffernan, J., dissenting).

3. Patricia Lines, *The New Private Schools and Their Historic Purpose*, PHI DELTA KAPPAN, January 1986, at 377; McCurry v. Tesch, 738 F.2d 271, 273 (1984), *cert. denied* 469 U.S. 1211, *reh'g. denied* 471 U.S. 1049 (1985).

4. NEB. REV. STAT. §79-1701 (Supp. 1986).

5. DIANE RAVITCH, THE SCHOOLS WE DESERVE 162 (1985).

meaning, could severely damage the institutional integrity and mission of private schools by transforming them into privately financed public schools. Educational pluralism, a hallmark of democracy, with its expansive allowance for different worldviews, values, beliefs, ideas, lifestyles and practices could be significantly diminished by state regulations mandating a greater degree of homogeneity in education. The dilemma of determining what appropriate relationship ought to exist between private schools and the state is complicated further by the prominent position of private schools in American education since the colonial era. Until the creation of public or government schools during the middle of the nineteenth century, private sources—churches, communities, apprenticeships, tutors, independent schools and families—performed the crucial task of passing on a way of life to the next generation. The establishment of state supported schools signaled a fundamental and radical change in the relationship between the state and the individual, the family, the community, and the church.[6]

While the benefits bestowed by the formation of state controlled schools should not be depreciated by private school advocates, neither should the problems or dilemmas created by the presence of government schools for our democratic republic be minimized by public school partisans. One of the key questions revolves around participation by private educational institutions in a society where a state sanctioned and supported school system is ideologically linked to the preservation and progress of the nation. One implication suggested by the establishment of a government school system and this ideological connection is the existence of some sort of majoritarian orthodoxy with respect to values, attitudes and behavior. How do the various minority groups and subcultures in America with their own sense of truth and reality fit into American society? How can they transmit these particular worldviews to their children? These questions become especially troublesome in light of our inability to arrive at a consensus on what constitutes a common curriculum, proper pedagogical procedures, and essential educational goals. They touch the core of our society by asking which values should be embraced by all and who should select them.[7] Furthermore, where is the line to be drawn be-

6. David Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355-388 (1976).

7. RAVITCH, *supra* note 5; Paul Damsen, *How Not To Fix The Schools*, 272

tween individual liberty and state interest, between pluralism and social unity, self-determination and government control, private purpose and public power?

In a political and cultural setting embedded with the ideology of government sponsored schools, private schools in America have presented a perennial problem to those wishing to standardize American children into a more homogeneous group. Private schools, on the other hand, have often functioned as a social safety valve by providing a way for those with educational, religious, or cultural views and values different from the majoritarian ideology to find legitimate expression in the education of their children. The ability of parents to do so, however, is determined by the extent of state intervention and regulation.

Historically, state governments have pursued four major strategies in attempting to deal with the private school dilemma. First, many states have elected not to regulate private schools or do so in a minimal manner. Second, other states have tried to produce superior government schools, hoping to entice students in private schools to enroll in public schools, thus causing private schools to fold.[8] Third, some states, like Oregon, have tried to ban private schools.[9] And fourth, additional states, such as Ohio (or territories such as Hawaii in 1927), have attempted to gain control through extensive and exhaustive regulations.[10]

B. Legal Overview

The United States Supreme Court has provided little in the way of legal guidelines in defining the proper relationship between the state and private schools. In *Pierce v. Society of Sisters* [11]the Court struck down an Oregon state statute which

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HARPERS 39-51 (1986); E.G. WEST, EDUCATION AND THE STATE (1965); and DONALD A. ERICKSON, SUPER-PARENT: AN ANALYSIS OF STATE EDUCATIONAL CONTROLS (1973) ERIC, ED 096 770.

8. This was the perspective of Horace Mann, a prominent advocate of the common school movement during the nineteenth-century. CLARENCE KARIER, THE INDIVIDUAL, SOCIETY, AND EDUCATION 61 (2d ed. 1986).

9. For example, James Carter and Henry Bernard, early leading figures of the common school movement, wanted to abolish private schools. DAVID TYACK, TURNING POINTS IN AMERICAN EDUCATION HISTORY 370 (1967); MERLE CURTI, THE SOCIAL IDEAS OF AMERICAN EDUCATORS 148-149 (1959).

10. Farrington v. Tokushige, 273 U.S. 284 (1927); State v. Whisner, 351 N.E.2d 750 (Ohio 1976).

11. 268 U.S. 510 (1925).

required all students to attend public schools. The *Pierce* case established two basic points. First, there would be a fence between the private and public sphere in education. Private schools had a constitutional right to exist, and parents had a constitutional right under the Fourteenth Amendment to an alternative educational choice besides a school sponsored by the state. Second, *Pierce*, as interpreted in subsequent cases such as *Wisconsin v. Yoder*,[12] indicated the general location of the fence, namely that the state had the right to regulate private schools in a reasonable manner if it chose to do so. *Meyer v. Nebraska*[13] and *Farrington v. Tokushige*[14] specified that the fence had to meet some minimal construction requirements. The fence was to be at least strong enough to prevent the state from crossing over to forbid the teaching of useful knowledge or gaining near complete control of private schools through extensive regulations. Since these early cases, the Court has refused to hear a number of lower court cases dealing with varying degrees of state intervention into private schools.[15]

The crucial questions about the proper relationship between the state and private schools still remain. The state has an important and legitimate interest in ensuring that all children receive an adequate education, whether in a state or nongovernment institution, is not the question. Two fundamental considerations, however, are the extent of that public interest and the best way to secure it in a public environment with other legitimate and competing interests. In the context of public policy concerns, to what degree should the state allow for social diversity, and just how different should private education be from public education? What limits should the state set for pluralistic means and ends in education? How much should government restrict the range of alternatives in education? The problem is succinctly summarized by Donald Erickson: "How can nonpublic education be both responsible

12. 406 U.S. 205, 213, 233, 236, 239 (1972).

13. 262 U.S. 390 (1923).

14. 273 U.S. 284 (1927).

15. New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); State v. Patzer, 382 N.W.2d 631, *cert. denied*, 479 U.S. 825 (1986); Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d 74 (Iowa 1985), *cert. denied sub nom.* Preussner v. Benton, 474 U.S. 1033 (1985); State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); State ex rel. Douglas v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), *appeal dismissed*, 454 U.S. 803 (1981).

and free? Responsible to serve the public interest; free to experiment and disagree. *Without* regulation, some schools may victimize patrons and endanger the general welfare. *With* regulation, dissent is jeopardized. Where should the balance be struck?"[16]

This article proposes a viable policy position defining the parameters of appropriate state intervention in the operations of a nonpublic school. It argues that a more pluralistic approach in public policy affecting private schools could better reconcile freedom and responsibility than an approach involving extensive state intervention.

II. STATE REGULATIONS

State regulation of private schools limit parental choice in education and childrearing. Regulation tends to take away with one hand what was given to parents by the other hand of the state—the primary responsibility for raising children and directing their education.[17] The procrustean character of regulations and their enforcement often homogenize and standardize the educational program for youngsters and parents who have diverse educational goals and needs.[18] The wholesale application of public school regulations to private schools "is but to require that the same hay be fed in the field as is fed in the barn."[19] To restrict parental choice and discretion in educa-

16. ERICKSON, *supra* note 2, at 2.

17. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Farrington v. Tokushige, 273 U.S. 284 (1927); Wisconsin v. Yoder, 406 U.S. 205, (1972).

18. Several examples illustrate the diverse character of educational needs and perspectives. *Yoder* addresses the distinctive religious and community life of the Amish; *see* Wisconsin v. Yoder, 406 U.S. 205 (1972). In the early 1970's the Santa Fe Community School with its nonreligious but distinctive "countercultural" emphasis was organized by a small group of parents and teachers; *see* Santa Fe Community Sch. v. New Mexico St. Bd. of Educ., 518 P.2d 272 (N.M. 1974). The Christian schools in Kentucky during the late 1970's opposed state regulations requiring state-approved teachers and textbooks as determined by the state board of education. They felt such teaching and curricular requirements intruded too much on their efforts to infuse a particular religious outlook in a child's educational experience. STEPHEN ARONS in COMPELLING BELIEF—THE CULTURE OF AMERICAN SCHOOLING 77-86 relates the story of Peter and Susan Perchemlides. In 1977, these parents objected to the "conformity, anti-intellectualism, passivity, alienation, classism, and hierarchy" that their children were being exposed to in the local public school in Western Massachusetts. Only after a lengthy confrontation and litigation with local public school officials were they able to secure permission to teach their personal political, cultural and sociological values in the context of their own educational philosophy.

19. Kentucky State Bd. v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979), *cert. de-*

tional practices with unjustified regulations is to harm both the child and the parent in significant ways. The seemingly arbitrary nature of regulations is antipluralistic, attacks the dignity of parents with children in private schools, intrudes into the delicate and sensitive relationship of parent and child, violates the parents' sense of moral and religious duty towards their children, and calls into question their competence and motivation without adequate justification.[20] In addition, the centralized decision making process producing educational regulations by individuals far removed from the "front lines" takes on an air of unwarranted state paternalism that is foreign to the democratic ethos of our society.

Restriction of personal liberty and institutional autonomy through state intervention into private schools also raises serious and significant questions about its moral justification, its legality, and its usefulness in achieving legitimate state objectives. The current state of our knowledge about education and learning casts deep doubts on the ability and competency of the state to construct a regulatory algorithm that is not substantially based on the opinions, personal preferences, and speculative ideas of state officials.[21] This pervading sense of arbitrary restrictions on significant personal decisions and liberty suggests an unethical dimension of significant proportion in current policy. The likelihood of infringing on basic constitutional rights such as right of privacy, rights of free exercise of religion, freedom of conscience and association along with potential violations of the Establishment Clause through regulatory entanglement suggest that the field of private school regulation is heavily mined with legal explosives. And finally, there is simply no way in which the state can know if its regulations are indeed accomplishing legitimate state objectives.[22] Henry Levin summarizes the issues facing the state's effort to regulate private schools and concludes that

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nied, 446 U.S. 938 (1980).

20. E. Vance Randall, Pluralism and Public Policy 293-297 (1989) (dissertation, Cornell University).

21. E.A. Hanushek, *Throwing Money at Schools*, 1 J. OF POL'Y ANALYSIS AND MGMT. 19-41 (1981); TYLL VAN GEEL, THE COURT AND AMERICAN EDUCATION LAW 264 (1987).

22. For a more extensive discussion and documentation of these points, see E. VANCE RANDALL, PUBLIC POWER AND PRIVATE SCHOOLS: A CASE FOR PLURALISM (in press).

> [a]t the heart of this view [public benefits of private education] is a substantial involvement of the state in private education to meet the public interest. Somehow the state must assure that at least a minimum set of public outputs are produced. Whether this can be done through mandating minimum personnel, curriculum, or output requirements is problematic. Surely personnel must be competent to impart the values and knowledge to produce public benefits efficiently, the curriculum must include the subjects and experiences that will contribute to this end, and the result must be reflected in the outputs of the schools.
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> Yet to assure this is so would require an unusual amount of regulation, and this would be costly, cumbersome, and probably unconstitutional to the degree that the state would need to become entangled in religion when evaluating whether schools meet these regulations. Furthermore, it is not clear that many of the public benefits of schooling can be measured for purposes of public accountability.[23]

In addition, there is little if any evidence that children have been harmed by attending private schools.[24] This would suggest a very reasonable and plausible assertion: that most state regulations, at the very least, do not make any positive contribution to the child's welfare and may even cause harm to parents and children involved in private schools.

The basic argument advanced by the state for the existence of regulations is to protect those children whose parents are abusive and/or incompetent. The state claims that some parents who enroll their children in private schools would not know whether their children were receiving an adequate educa-

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23. Henry M. Levin, *Education as a Public and Private Good*, 6:4 J. OF POL'Y ANALYSIS AND MGMT. 635 (1987). Although Levin is correct in pointing out the great difficulty in evaluating the educational process, he neglects an equally problematic area—the substantive content of education. What knowledge is of the most worth? Which values, attitudes and viewpoints are the "correct" ones?

24. A typical example would be Sheridan Road Baptist Church v. Dept. of Education, 396 N.W.2d 373, 418, n. 54 (Mich. 1986), *cert. den.*, 481 U.S. 1050 (1987). Results from achievement tests submitted to the court indicated "acceptable and, indeed, above average levels of scholastic achievement." In fact, the state admitted that "there [was] no allegation on [its] part that the children were being deprived of an education or being miseducated." (*Id.*, at 417, n. 53). For additional examples, *see* Pierce v. Society of Sisters, 268 U.S. 510 at 534; *Iowa Parents Symbols of Defiance on Schools*, N. Y. TIMES, March 25, 1987, at A10; Wolman v. Essex, 342 F.Supp. 399, 405, *aff'd*, 409 U.S. 808 (1972), *reh'g. denied*, 413 U.S. 923 (1973) and *remanded*, 421 U.S. 982 (1975); Board of Education v. Allen, 392 U.S. 236, 247-248 (1968); Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).

tion or would not care if their children were educated. The state also claims that some private school operators are incompetent and try to deceive the public. In any of these examples, significant harm could be done to the child and unnecessary burdens would be imposed on society. This point is very important and must be taken seriously. The state has a responsibility to protect children from parental and other private decisions that cause serious injury to the child.

A great part of the difficulty, however, lies in the fact that the state does not know *which* parents and private schools may act in irresponsible ways that cause significant harm to the child. The virtue of regulations, then, is their all pervasive sweep which anticipates irresponsible acts and attempts to prevent injury from occurring. This all inclusive reach of regulations is, paradoxically, both a virtue and vice of regulation since this also imposes a very real and staggering cost on the great majority of parents with children in private schools and private schools who are competent.[25] But are there not ways in which public policy in education can reduce these costs and still provide at least the same level of protection against potential harm to children? Is there not a way in which "freedom and responsibility . . . can be united and reconciled to the best advantage" of all?[26]

III. INTERNAL REGULATORS

While the state's rationale for issuing regulations carries considerable weight, the force of its argument is significantly reduced when applied to the private school setting. Several self-regulating features inherent in private education accomplish most of what state regulations are supposed to do. Furthermore, these internal regulators perform their protective function through a natural selection process with little, if any, infringement on personal liberty.

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25. "Both centralized decision making and legislated curriculum presume that there is 'one best way' to help young people learn. Both presume, too, that those farthest removed from the place where the action of teaching and learning take place can make better decisions about what should be taught and how improvement can be fostered than those who are closest to the action. Such presumptions are at the very least naive and they may actually be dangerous." Jack Frymier, *Legislating Centralization*, PHI DELTA KAPPAN, May 1986 at 646. See also E.G. WEST, EDUCATION AND THE STATE 9 (1965).

26. CARL L. BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 3 (1953).

A. Parental Interest

One of these self-regulating features is that parental choice of private education over public education constitutes *prima facie* evidence that they are vitally concerned about their child's upbringing and education. The decision not to enroll a child in the state school system often comes after careful study and reflection. Private education is not the cultural norm. Attendance at a private school is a gesture of dissent from the predominant public school culture in American society. Also, it often requires significant financial and personal sacrifices "in face of high taxation, inflation, and sometimes job loss."[27] These significant barriers would be more than sufficient deterrents to those few parents who do not care about their children's educational development.

Parents who select private education for their children also demonstrate that they know the basics of a quality education. They have not only done a comparison between the public and private sector but have selected a particular private school. This would strongly suggest that they are competent to direct the proper education of their children. In a study by Donald Erickson comparing preferences of parents in private and public schools, the "top-priority reason" given by parents preferring private schools was Religion/Spirituality (22%), followed by Academic Quality/Emphasis (20.5%), and Discipline (16.8%). In contrast, parents preferring public schools listed their main reason as Don't Know (13.6%), followed by Cheapness (13.3%) and Proximity, Convenience (12.5%).[28] It is little wonder that Erickson could suggest that

> parents who actively seek out schools that fit their preference are unusually well informed, sophisticated, thoughtful, and concerned about their children's schooling. In exercising their preferences, these parents sort themselves out into schools with different emphases and obtain much greater satisfaction than do the parents who do not actively choose. If the ratings by these people may be taken seriously, the quality of their

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27. Congress, Senate, Committee on Labor and Human Resources, QUALITY OF EDUCATION, PART 2, 30, 50 (1983), testimony of William B. Ball.

28. Donald A. Erickson, *Choice and Private Schools: Dynamics of Supply and Demand*, PRIVATE EDUCATION: STUDIES IN CHOICE AND PUBLIC POLICY 93-94 (Daniel C. Levy ed., 1986). It is of interest to note that the "Don't Know" category was not selected by any private school parent as a reason for preferring private education.

children's schooling might have been inferior if the options in question had not existed.[29]

B. Parental Investment

A second way in which the private school choice naturally operates against the possibility of educational deprivation for private school students is the vested interests of the parents. They not only have great concern about the proper development of their children, but they also have made significant emotional and psychological investments, as well as time and money, in the private school choice. Parents have a definite interest in seeing that their child does well and they desire to have substantive involvement in their child's educational progress. In doing this they perform the dual function of providing quality control and being a source of support. The studies by James Coleman and Karl White have suggested that family variables account for a good portion of the variance in academic achievement.[30] Because of this active involvement by the parents, private school students have a better than average chance of receiving a more than adequate education.

C. Economic Realities

A third internal regulator is the economics of private education. The market for the educational dollar is a tight one. If parents cannot find an educational experience superior enough to that offered in the public schools, what rational incentive is there for them to pay school taxes *and* private school tuition for an inferior or even equivalent educational program? Private school operators and potential customers are aware of this. "Parents *will* withdraw their children," notes William Ball, "from schools which are poor in quality, or poor in discipline. That in fact is why so many parents have removed their children from public schools."[31] It is not in the best interests of private schools to offer shoddy educational programs. If they do not satisfy a clientele that is knowledgeable, the students will

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29. *Id.* at 98.

30. James S. Coleman et al., *Equality of Opportunity Survey* (Washington, D.C: National Center for Educational Statistics, U.S. Government Printing Office, 1966); Karl R. White, *The Relation Between Socioeconomic Status and Academic Achievement*, 91 PSYCH. BULLETIN. 461-181 (1982).

31. Ball, *supra* note 27.

'be withdrawn and the schools will be forced to close or respond to the demands of the parents. Furthermore, private elementary and secondary schools, unlike private trade or technical schools, have a long term interest in the educational career of the child. It is to their advantage to provide quality education year after year in order to keep students coming back.

D. Educational Environment

A fourth intrinsic factor which may prevent any harm from occurring to children in private schools is the educational milieu of the school. This mitigation of educational injury occurs in two major ways. First, private schools have the institutional autonomy to exercise a greater amount of control over the educational environment of the school. They have a driving incentive to develop the kind of characteristics found in effective schools. These include such things as "clear sense of purpose, an institutional ethos, [and] team spirit,"[32] along with "curricular goals, high expectations for students, dedicated teachers, effective discipline . . . strong emphasis on academic subjects,"[33] "strong educational leadership,"[34] a shared "belief structure, a value system, a consensual rather than hierarchal governance system, and a set of common goals that blur the boundaries between . . . private and organizational lives" of the school community.[35] This has led several researchers to suggest that the difference in achievement found in the Coleman, Kilgore, and Hoffer study between public and private school students might be partially explained by the relative latitude private schools have to construct and customize an educational environment conducive to excellent education.[36]

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32. Jack Frymier, *Legislating Centralization*, PHI DELTA KAPPAN 648 (1986).

33. DENIS P. DOYLE & TERRY W. HARTLE, EXCELLENCE IN EDUCATION: THE STATES TAKE CHARGE 52 (1985).

34. John E. Chubb and Terry M. Moe, *Politics, Markets, and the Organization of Schools*, Paper presented at the Annual Meeting of the American Political Science Association, New Orleans, Louisiana, 28 August-1 September, 1985, (ERIC, ED 263674, 5).

35. Chester Finn as quoted in DOYLE, *supra* note 33. See also Willis J. Furtwengler *Implementing Strategies for a School Effectiveness Program*, PHI DELTA KAPPAN, December 1985) at 265; Gerald Grant, *The Character of Education and the Education of Character*, 18 AMERICAN EDUCATION 37-46 (1982).

36. John E. Chubb and Terry M. Moe, *Politics, Markets, and the Organization of Schools*, ERIC (ED 263674). See also John E. Chubb, *Why the Current Wave of School Reform Will Fail*, 90 THE PUBLIC INTEREST 28-49 (1988).

Another means by which the private school environment reduces the possibility of a student receiving an inferior education is the influence of his classmates. Richard Murnane contends that private school students have higher achievement scores than public school students in part because more capable students attend private schools than public schools.[37] Having such "fellow students," states Murnane, "plays a significant contributing role in determining student scores."[38] Cookson and Persell report that the susceptibility of youth to peer pressure "can have an impact on even an indifferent student" surrounded by classmates "who are academically interested and ambitious." As one student observed, "It isn't cool to be dumb around here."[39]

Thus the private school environment, both in terms of institutional culture and the students who comprise the student body, functions as an additional intrinsic governor greatly moderating the possibility of a child receiving an inadequate education.

IV. EXTERNAL REGULATORS

A. Justification for Regulation of Private Schools

The available evidence from court cases and research on private schools suggests that concerned and competent parents do try very hard to ensure that their children are receiving a good education in the private sector.[40] But parents and private school personnel are not infallible. There is the remote possibility that parental interest and the internal regulatory features inherent in private education will not be sufficient in every instance to protect the interests of the child. What should

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37. Richard Murnane, *Comparisons of Private and Public Schools: The Critical Role of Regulations*, PRIVATE EDUCATION: STUDIES IN CHOICE AND POLICY 138, 144 (Donald C. Levy, ed. 1986).

38. *Id.* at 138-152. *See also* Richard Murnane, *Comparisons of Private and Public Schools: What Can We Learn?*, PRIVATE EDUCATION: STUDIES IN CHOICE AND POLICY 138-152, 153-169 (Donald C. Levy ed. 1986); Richard Murnane, *The Uncertain Consequences of Tuition Tax Credits: An Analysis of Student Achievement and Economic Incentives*, and J. Douglas Willms, *Do Private Schools Produce Higher Levels of Academic Achievement? New Evidence for the Tuition Tax Credit Debate?*, PUBLIC DOLLARS FOR PRIVATE SCHOOLS 210-222, 223-231 (Thomas James & Henry Levin eds., 1983).

39. As quoted in PETER W. COOKSON, JR., & CAROLINE HODGES PERSELL, PREPARING FOR POWER: AMERICA'S ELITE BOARDING SCHOOLS 95 (1985).

40. Tyack, *supra* note 6.

be done in these rare cases? The use of regulations still remains attractive to the state, but perhaps more for reasons of administrative ease and convenience for the state's educational bureaucracy than in providing demonstrable benefits to the child. What approach can replace the indiscriminate effects of the regulatory cannon with the focused impact of a narrowly defined policy? What would be the most effective types of external regulators?

One approach to answering these important questions is to look at all the state regulations governing private schools and begin to select those which appear to be essential for protecting the basic liberty rights of children. This approach has some merit but is exceedingly burdensome and complex, somewhat analogous to searching for four-leaf clovers in a football field. One must first gather all of the pertinent regulations, then sort through them and by some predetermined criteria select the ones that appear to be essential. One potential flaw in this approach is the assumption that the current body of private school regulations contains all of the essential regulations.

A more effective approach is to rephrase the question in terms of identifying those things which would definitely *prevent* a child from receiving a basic education rather than trying to identify all of the contributing ingredients of a basic education. These "failure factors" would be proper areas for state regulation.

B. Appropriate Areas for State Regulation—Failure Factors

The first and most obvious way in which a child can fail to be properly educated is through loss of life or physical well-being. Regulations such as fire, safety, health, and building codes which work to ensure a safe and secure learning environment are essential. Along these same lines would be important regulations prohibiting the physical, emotional, spiritual, and sexual abuse of children. The protection of children from physical harm and danger is fundamental to the exercise of personal liberty and is a critical area for state supervision in private as well as public schools.

Secondly, to ensure that all children have an opportunity to learn and grow in fundamental and essential ways, the state has a duty to require that such an opportunity be provided through compulsory education laws. Reports and reporting procedures necessary to account for every single eligible child in the state would be a proper action on the part of the state.

Each private school should be required to notify the state of its existence through some scheme of registration. They should also report the names, addresses, and parents or guardians of those students who have enrolled and those who withdraw.

A third major way in which a child's educational experience could be seriously compromised is through parental ignorance. In private education this could happen in two ways. First, the private school could attempt to defraud parents with false and misleading information about the school and the progress of their children. Second, vital information that a parent would need to assess the quality of the education offered by the school and to find the right "fit" between various educational programs and the particular needs of their children may not be available. In addition to prohibiting unethical business practices such as "fraud, embezzlement, [and] false solicitation,"[41] private schools should be required to meet some type of truth-in-education disclosure standards. These could include information on such areas as admission requirements,[42]

> financial statements; physical facilities; staff, including their education and experience; curriculum requirements for graduation; present students and numbers that have failed or dropped out; average and median scores of students on standardized aptitude and achievement tests; academic placement and performance of students after graduation; statement of the school's basic philosophy and methodology of education,[43]

and policies relating to the internal workings of the school such as discipline, grading, extracurricular activities, liability insurance, tuition, and other program costs.[44] This type of information would greatly increase the effectiveness and competency of parents in meeting the basic educational needs of their children.[45] This area, however, must be approached in a parsimonious fashion or extensive requirements could violate the

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41. Ball, *supra* note 27, at 51.

42. John E. Coons, *The Voucher Alternative*, 9 JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES Spring 1984 at 97.

43. John Elson, *Legal Dimensions of the State Regulation of Nonpublic Schools*, SUPER PARENT: AN ANALYSIS OF STATE EDUCATIONAL CONTROLS 4/57 (Donald A. Erickson ed. 1973, ERIC ED 096770).

44. For some examples of what has been done in some states already, see NEV. REV. STAT. ANN. Sec. 394.241 (1985); 6 N.J. ADM. CODE 34-1.5 (1968); 16 VER. STAT. ANN. 165a (Supp. 1985).

45. A logical extension of this point would be to require the same amount of information to be disclosed by public schools as well.

Establishment Clause forbidding excessive entanglement by the government in religious institutions.[46]

A fourth and final situation in which the basic liberty interests of children could be violated in a fundamental way is by the deprivation of basic literacy skills. The ability to read, write and perform basic computational skills is the universal foundation upon which all other learning is built.[47] The state would be fully justified in mandating that any educational program enrolling children of compulsory education age be required to equip each child with these basic literacy and mathematical skills. (This assumes, of course, that the child has the capacity to learn and is not learning disabled.)

These four areas represent universal ways in which a child would fail to gain an education essential to his personal development and the security of our democratic society. They qualify as essential areas of state intervention and fall within the realm of justified state regulation.

C. Standards of Judicial Review

The specific form and content of regulations that the state may develop in these four essential areas—ensuring a safe and secure learning environment, universal formal education, ethical business practices and truth-in-education, and basic literacy topics of reading, writing and arithmetic—are not self-evident. This leaves open the very real possibility of the state issuing regulations "under the guise of protecting the public interest by legislative action which is arbitrary or without some reasonable relation" to these four key objectives in educational policy.[48] A fundamental principle in our liberal democratic society is that the state is obligated to justify limitations placed on liberty.[49] Justified intervention includes *both* legitimate objectives and legal means.[50] There are both substantive and procedural grounds (fundamental rights and hearing rights) that the state must meet before it can legally restrict personal liberty.[51]

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

47. The Supreme Court defined "basic education" as comprising the basic literacy skills of reading, writing, and arithmetic in Wisconsin v. Yoder, 406 U.S. at 213 and 225-226.

48. Meyer v. Nebraska, 262 U.S. at 400.

49. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

50. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Pierce, 268 U.S. 510 (1925).

51. *See*, e.g. fundamental rights, Roberts v. United States Jaycees, 468 U.S.

Even in the important areas of health, safety, fire and building code regulations, state regulations could be constructed and enforced in an arbitrary manner, and may pose formidable obstacles to parental choice in education through "hypertechnical" codes.[52]

If attempts to modify legislation or use administrative hearings do not provide a satisfactory resolution of state intervention, the only recourse available to parents and private schools is litigation. The standard of judicial review that the court selects in adjudicating disputes over the constitutionality of legislation and state action is critical to the outcome of the case. If the rational-means test is used, then the chance of parents and private schools prevailing is next to nothing because state action is considered *presumptively* rational and thus constitutional until proven otherwise.[53] The usefulness of this test would only be found in cases where there was an outrageously clear and blatant invasion of liberty rights such as the banning of the private school option. Yet the other common standard of review, the strict scrutiny test,[54] may impose overly harsh and rigid restraints on the state to act in critical areas of obvious importance such as health and safety. There has been emerging in recent times, however, the creation and use of a judicial standard of review that stands between the rational means test and the strict scrutiny test that has great potential value in protecting the important interests of both the state and the private educational sector.

1. *Intermediate standard of review*

The developing third standard of review has been used by the Supreme Court to scrutinize legislation under the Equal Protection Clause of the Fourteenth Amendment where certain

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609 (1984); Griswold v. Connecticut, 381 U.S. 479 (1965). *See*, e.g. hearing rights, Ingraham v. Wright, 430 U.S. 651 (1977); Goss v. Lopez, 419 U.S. 565 (1975).

52. City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982). Also, Erickson reported that the fundamentalist Christian school in Peshkin's study was unduly harassed "by public authorities through capricious application of health and safety codes, Erickson, *supra* note 28, at 92.

53. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); New Orleans v. Dukes, 427 U.S. 297 (1976); McGowan v. Maryland, 366 U.S. 420 (1961).

54. *Id.* *See also* Plyler v. Doe, 457 U.S. 202 (1982), *reh'g. denied* 458 U.S. 1131; San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), *Reh'g. denied* 411 U.S. 959.

suspect classifications did not warrant strict scrutiny review.[55] A major function of the Equal Protection Clause is to "operate as an anti-majoritarian safeguard which views with suspicion all public actions tending to burden 'discrete and insular' minorities."[56]

The selection of the intermediate standard usually occurs when "important, though not necessarily 'fundamental' or 'preferred,' interests are at stake . . . [where there has been] either a significant interference with liberty or a denial of a benefit vital to an individual."[57] This "heightened standard of review," "intermediate standard of review," or "'second order' rational-basis review"[58] has been applied directly by the Court to cases touching on classifications based on gender;[59] legitimacy;[60] or children of illegal aliens.[61] These areas are "beyond individual control and bear no relation to the individual's ability to participate in and contribute to society."[62]

The application of this third standard by the Supreme Court to important but not necessarily fundamental rights such as parental choice in private education is worthy of consideration. First, there are some good indications that, because private school regulations affect a particular minority group in some important ways, a higher standard of review should be required. In *United States v. Carolene Products Co.*, the Court wondered whether

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55. Seone v. Ortho Pharmaceuticals, Inc., 660 F.2d 146 (5th Cir. 1981).

56. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1077 (1978).

57. *Id.* at 1089, 1090. Admittedly the exact nature and boundaries of this intermediate standard and the other two are far from clear. Archibald Cox critically observes that

> [i]n the middle ground confusion reigns. The original doctrinal purity of the 'strict scrutiny-compelling public purpose' and 'minimum rationality' tests has yielded to three formulations. All three have surrendered even the pretense of precision . . . .
>
> The net effect in the middle ground has been ten or twelve years of highly particularistic decisions resulting from shifting alliances among the Justices.

ARCHIBALD COX, THE COURT AND THE CONSTITUTION 321 (1987).

58. Cleburne, 473 U.S. 432, 440, 453, 458 (1985).

59. Craig v. Boren, 429 U.S. 190 (1976), *reh'g. denied*, 429 U.S. 1124 (1977).

60. Clark v. Jeter, 486 U.S. 456 (1988).

61. Plyler v. Doe, 457 U.S. 202 (1982), *reh'g. denied*, 458 U.S. 1131 (1982).

62. Cleburne v. Cleburne Living Center, Inc., at 440 (1985). The categories of "race, national origin, or alien status" are considered as suspect classifications and require the strict scrutiny test. TRIBE, *supra* note 56, at 1060.

> legislation which restricts those political processes . . . is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . [and] whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon, supra*; *Nixon v. Condon, supra*; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[63]

It is important to note that many of the Court cases referred to in this famous footnote in the *Carolene* decision were landmark cases involving the state and private schools. They were examples selected by the Court of normal political processes not offering sufficient protection for a minority group from majoritarian or state government domination.[64] The history of private schools and the state is a rocky one with prejudicial attempts by the government to eliminate their presence through prohibition or through excessive regulation. The fact that it required three Supreme Court decisions (*Meyer*, *Pierce*, and *Farrington*) to insure the private school option attests to the fact that the customary political processes have often not been very effectual in protecting their interests. Laurence Tribe sees the *Meyer* and *Pierce* cases as

> demonstrat[ing] judicial solicitude for the Catholics in Oregon and the Germans in Nebraska against whom the invalidated statutes had evidently been directed because of the inability of those groups to adequately safeguard their interests through the political processes of their states.[65]

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63. 304 U.S. 144, 152-153, n. 4 (1938).

64. "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities," Minersville District v. Gobitis, 310 U.S. 586, 604 (1940), (Stone, J., dissenting).

65. TRIBE, *supra* note 56, at 1320.

In *San Antonio Independent School District v. Rodriguez*,[66] the Court declared that wealth was not a "suspect class" and did not have any of the traditional "indicia of suspectness:. . . [such as] a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[67] In noting the similarities in language between the *Carolene* footnote and the *Rodriguez* case, "[sh]ould 'political powerlessness' alone," queries Gunther, "justify a conclusion of 'suspectness'?"[68]

Parents do suffer a loss of parental liberty to direct the education of their children when educational choices are restricted by private school regulations. The benefits of providing a more suitable education to their children from their perspective, and doing so in a manner which is compatible with their conscience and personal beliefs, are important and significant. They are the same benefits which public school parents enjoy. The denial of these liberties imposes substantial burdens on parents in their efforts to rear their children and invades the intimate and private sphere of family life.

Many parents with children in private education claim that state regulations infringe on their religious beliefs and diminish their right to privacy in raising their children according to their conscience. These kinds of assertions begin to touch on areas of fundamental, constitutionally-protected rights. This raises another interesting question in terms of judicial review: what would prevent the Court from using the intermediate standard of review under the Due Process Clause of the Fourteenth Amendment for cases that may hover near the periphery of these fundamental, substantive rights?

All of this suggests that the idea of requiring a "more searching inquiry" into state efforts to regulate private schools has currency and must be taken seriously. This article contends that such should indeed be the case. All state regulations governing private schools should be subjected to a "more exacting judicial inquiry," at least at the intermediate level of review. This will offer a more balanced protection of the personal liberty rights of parents, private school personnel, and of the

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66. 411 U.S. 1 (1973).

67. *Id.* at 28.

68. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 657, n.1 (12th ed. 1991).

state. It would also contribute to the pluralistic character of our society and strengthen our democracy.

Tribe describes six ways in which the intermediate standard of review has been used to offer a more substantial protection of liberty interests.[69] First, it requires that legislation be evaluated as to its degree of importance. Second, it requires that there be a fairly close connection or fit between the objective of the legislation and the means selected to achieve it.[70] Third, the judge needs to look at the case from the viewpoint of the aggrieved party.[71] Fourth, it asks that a "current articulation" or rationale be given by the state for the regulation.[72] The regulation must fulfill a contemporary purpose as given by the state. Fifth, principles must precede programs. Regulations should flow from a rationale. The rationale or justification for the regulations cannot be given in hindsight.[73] And sixth, it requires the opportunity for rebuttal.[74] The state must allow for exceptions to the regulation if the offended party can demonstrate sufficient reasons to be exempt.

These six suggested techniques for establishing the validity for all private school regulation do not seem overly burdensome or restrictive to the state. The intermediate standard of review would require that the state exercise much more care and precision in drafting regulations, which in turn would help reduce the potential for capricious legislation and/or arbitrary enforcement. It would also provide a more equitable forum where parents and private schools could contest offensive legislation without having to subject them and the state to the much more inflexible, demanding and difficult strict scrutiny/compelling interest standard. The use of the intermediate standard of review puts "teeth" into what the state is always required to do—justify its restriction on personal liberties. It is more sensitive to those who have a justifiable reason to be exempt from the regulation. To the degree that restrictions on personal liberty are placed on those who actually deserve it, they become more ethical, constitutional, and effective expressions of public policy.

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69. TRIBE, *supra* note 56, at 1601-1610.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

2. Strict scrutiny

Some might contend that the above criteria for state supervision of private schools is far too conservative and should be enlarged to include the mandatory instruction in a "common core" of knowledge. The idea of a common core has much intuitive appeal.[75] Every child should not only learn the basic literacy and math skills but should also learn important facts about the world, our culture and way of life. An interesting aspect, however, about the "common core" argument is that the common knowledge that should be held in common by all is not commonly known or self-evident. Erickson points out that the

> educational *desiderata* of this type can be listed almost indefinitely, far beyond the bounds of student time in the high school and even the undergraduate college. We are forced, then, to confront questions pondered for generations by proponents of liberal education: What knowledge is of the most worth? What knowledge is utterly essential? . . . But if we cannot identify what everyone must master, by what warrant do we specify what everyone must undergo?[76]

But a much larger problem than agreement on general topics or categories is defining the substantive details of the common core.[77] Which "ideas, values, [and] political views" are to be selected and how will they be taught? A crucial problem with expanding beyond the basic literacy skills is the entrance into dangerous terrain filled with preferences, opinions, values, personal beliefs, and worldviews. This is a very problematic area because it deals with the content of educational experience upon which there is not much agreement and, yet, it is proposed that what is decided be imposed upon all children by the police power of the state. This rather arbitrary action simply

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75. Some even question the notion of the need for a common core of educational experience, at least in the sense of common values. David Nichols suggests that the "idea that a state can exist only when the people share a common set of values is mistaken. Even in a relatively homogeneous state like the United Kingdom, values differ quite radically from one section of the population to another." What a society needs is "a majority of the people . . . shar[ing] a belief in the importance of civil peace, combined with a willingness to allow their fellow citizens to live life as they choose to live it. They must also recognize some machinery which is the normal channel for resolving disputes." DAVID NICHOLS, THE PLURALIST STATE 122-123 (1975).

76. ERICKSON, *supra* note 2 at 2/7, 2/9.

77. For some interesting work in this area, see E.D. HIRSCH, JR. ET AL., THE DICTIONARY OF CULTURAL LITERACY (1988).

creates an "unmanageable conflict over matters of conscience"[78] in government socialization of all children.

If the state feels strongly about specifying and mandating a common core of knowledge for all children in both public and private schools, it should prove that such regulatory action is constitutional. This burden of proof should be that required by the strict scrutiny standard because the fundamental right to privacy, parental rights, and those rights protected by the First Amendment require such a standard and would be ideal components to form a "hybrid" case as required for all Free Exercise claims.[79] The government must give evidence of a compelling state interest and allow a least restrictive alternative if it wants to impose requirements extending beyond the four basic areas of proper state intervention previously outlined. Stephen Arons contends that

> [i]mposing this well-established constitutional standard on government bodies that attempt to regulate the essentially private function of education would eliminate upwards of 95 percent of the conflicts over schooling reported here.[80]

The important issue of identifying factors leading to failure rather than all those contributing to educational success needs to be addressed in evaluating the common core argument and other proposals for extending the arm of the state into private school functions. For example, will a child fail to become a good citizen and contribute to the economy if private education does not teach a common core of knowledge above and beyond basic literacy skills? It is not entirely obvious this would be the case. With these basic literacy skills, students could conceivably manage to acquire whatever "common core" they need to have. In addition, the probability of a viable private school offering only instruction in basic literacy skills seems quite improbable and not supported by available evidence.[81]

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78. STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 209 (1983).

79. Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990), *reh'g. denied* 496 U.S. 913.

80. ARONS, *supra* note 77 at 213. *See also* Neal Devins, *State Regulations of Christian Schools*, 10 J. OF LEG. 351-381 (Summer 1983); Wendell R. Bird, *Freedom From Establishment and Unneutrality in Public School Instruction*, 2 HARV. J. OF L. AND PUB.POL'Y. 125-205 (Summer 1979); Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J. OF L. AND EDUC. 523-579 (October 1984); and TYLL VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM 167 (1976).

81. For example, the school Alan Peshkin studied was located in a state with

3. Perspective

Finally, it is crucial in any discussion of state controls for private schools to keep in mind that a violation of these regulations has been considered a criminal offense with fines and/or jail sentences attached. Children attending unapproved private schools have been declared as neglected children and removed from their homes by the state. One way to help keep this important perspective when deciding which private school activities should be regulated by the state is to pose this question: If a private school refused to comply with a proposed requirement, would the lack of compliance be of such a nature as to justify the closing of a private school? If parents enroll their children in a private school not in full compliance with certain state regulations, is that noncompliance of such a magnitude as to justify the removal of the children from their homes and parents? Is the nature of the penalty proportional to the size of the offense or the potential harm that may result?[82]

V. THE PROPER ROLE OF THE STATE

What is proposed here, then, is not total withdrawal or abdication of the state from the supervision of private schools. Through the judicious use of external regulators such as state regulation only in the four essential areas (safe environment, compulsory education, unethical practices, and basic literacy skills), the state can and should play a fundamental role in

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no regulations specifying curricular topics. Its curriculum offering was, therefore, voluntary and included such courses as English, science, band, math, religious education, physical education, geography, choir, U.S. history, world history, journalism, physical science, algebra, functional math, biology, speech, driver education, industrial arts, drafting, typing, health, drama, office practice, Spanish, physics, government, and economics. ALAN PESHKIN, GOD'S CHOICE - THE TOTAL WORLD OF A FUNDAMENTALIST CHRISTIAN SCHOOL 301-302 (1986).

It should be noted, however, the this particular private religious school, in contrast to many other private schools, was financially well off and could afford to offer a substantial curriculum. This illustrates a dilemma facing many private schools which is beyond their control. State policy may require a substantial curriculum be offered at a private school but the financial resources to pay for such programs are limited by current public funding policies for private education. The private school is simultaneously pushed in one direction and pulled in another by the state. It is required to meet state-imposed mandates, but the private school is not given the resources to meet the requirements.

82. It is interesting to note the different treatment accorded those in the public school sector. If a child fails in a public school, are the parents charged with neglect? If uncertified teachers teach in public schools, are those schools closed?

protecting the liberty interests of the child and the parent. Conflict and disagreement can be minimized if areas of state regulation are limited to those where there is near universal agreement. Conflict can also be reduced by pursuing policies that broaden the regulatory menu and allow for more choices. This includes such things as giving private schools the option of either having a certified teacher or teaching a required curriculum, of choosing between input items such as teacher qualifications or curriculum requirements versus output factors such as taking standardized tests, of being allowed to seek approval by the state or approval by a private accrediting agency. All of these are ways in which liberty can be maximized and harm minimized. Regulatory emphasis on ends instead of prescribing the means also allows a much greater breadth for the exercise of responsible choice and the preservation of personal liberties.

There are other ways in which the state can be a positive influence in improving private education and protecting the liberty interests of the child. It can provide information, recommendations, and research results on educational issues and programs to private schools. Private school personnel could be invited to attend inservice workshops sponsored by the state for its teachers. Four states—New York, Florida, Louisiana, and Ohio—have established state advisory boards with state and private school officials where they can work together on matters of mutual concern.[83] There is great potential value for the education of children and our society in transforming the usual adversarial relationship between the state and private schools and parents into one of mutual respect and cooperation.[84]

Another area of great importance is the development of alternative approaches to litigation in resolving disputes between the state and private schools such as arbitration under the auspices of neutral third parties, the full utilization of administrative hearings, and continued efforts to modify offending legislation. The costs of litigation for parents and private schools presents a formidable obstacle in their efforts to pursue

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83. Phyllis L. Blaunstein, *Public and Nonpublic Schools: Finding Ways to Work Together*, PHI DELTA KAPPAN, January 1986, at 368-372.

84. DAVID S. SEELEY, Education Through Partnership (1985).

Donald Erickson states that the "best safeguard against harmful governmental interference in nonpublic school affairs is . . . not reliance on either substantive or procedural legal rights, but on a constructive and cooperative approach towards the settlement of differences." Erickson, supra note 2, at 4/50.

and obtain judicial relief from state encroachment. The *Whisner* case, for example, cost the small church school over $30,000 in legal fees.[85] The state, on the other hand, has almost limitless resources because it is able to externalize its costs upon the taxpayers. This raises questions of equity.

To safeguard against the natural tendency of petty despotism, all state regulations must at least pass an "intermediate standard of review." A "strict scrutiny" review should be required for all regulations touching on the actual content and process of the educational program, e.g. required courses, textbooks, specific teacher qualifications, etc. The state must show a substantial means-end relationship between the specific manner in which it wants to limit the liberty of private schools and parents and a legitimate state objective. This requires the state to do what is required of parents and private schools—act in a responsible, justifiable manner with its prerogatives and authority. The Supreme Court has stated that

> [t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.
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> . . Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.[86]

VI. CONCLUSION

This article began with a chilling and sobering account of the closure by the state of two private schools. These events raised several key questions about the general role of the state in society and its proper relationship to private elementary and secondary schools. What should be the appropriate public policy towards private schools? What legitimate interests does the state possess that would justify government intervention into private schools? Which private school affairs should be regulated and controlled by the government?

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85. James C. Carper, *The Whisner Decision: A Case Study in the State Regulation of Christian Day Schools*, JOURNAL OF CHURCH AND STATE, Spring 1982, at 295, n. 49.

86. Parham v. J. R., 442 U.S. 584, 603 (1979). See also the Court's rejection of the state as a Platonic guardian of the child by removing the parents from any parental role. This would result in "doing violence to both the letter and spirit of the Constitution." Meyer v. Nebraska, 262 U.S. 390, 401-402 (1923).

The dilemma comes into full focus when the fundamental and important interests of the state are juxtaposed with those of the parents and sponsors of private schools. How can the state be sure that parents and private schools are protecting the vital interests of the child and society in a private educational setting? What is the proper mix of responsibility and freedom? What guarantee is there that private schools can act in a responsible manner and yet retain their institutional uniqueness? Where is the point at which government is able to protect its legitimate interests and yet leave the private education option with sufficient internal integrity to remain a real choice, a refuge for cultural, religious, and educational dissenters?

The indeterminate nature of education and the ambiguity of educational and social goals preclude the state's ability to pinpoint with any practical accuracy where the interests of the state end and those of the private school begin. The magnitude of the imprecision is sufficiently large to preclude any attempts to fine tune regulations to avoid potential pitfalls and dangers. These pitfalls and dangers are of such importance that they require the state to exercise a very cautious and conservative approach toward any kind of control over private schools. The only appropriate alternative is to embrace and protect a more structural and substantive pluralism in American education. A public policy in education grounded on essentials, yet heavily imbued with pluralism, can escape many of the problems and difficulties created by state intervention and yet be able to adequately address the *basic* concerns raised by both sides.

A more pluralistic approach in public policy affecting private schools is not only required but could more effectively reconcile freedom and responsibility to the best advantage of *everyone* than an approach involving extensive state intervention. Important internal regulators such as parental interest and investment, economic realities of the educational market place, and a unique educational environment are significant factors which would prevent harm from occurring to a child. These internal, self-regulating features of private education are legitimately supplemented with a minimal amount of external regulation. State regulations mandating a safe and secure learning environment, universal formal education, ethical business practices, and curriculum requirements in basic literacy act as a safety net to insure that children attending private schools will receive an education meeting the essential inter-

ests of the state and satisfying the liberty interests of parents and private schools.

An educational policy based on pluralism with its emphasis on the maximization of liberty, the decentralization of decision making, and the recognition of private groups, is, admittedly, neither risk free nor perfect.[87] But the current regulatory approach used by those states involving substantial intervention into private schools (or the massive regulation of public schools for that matter) is no better.

The pluralistic approach advocated by this paper suggests a superior means to maximize choice for parents and private schools and still provide reasonable assurances to protect the liberty interests of children.[88] It would enrich American education, resolve much of the current conflict between the state and private schools, and present a feasible solution to preserving both freedom and responsibility in our society.

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87. Robert Dahl reminds us that "to say that a solution has disadvantages is never a good reason for preferring the worse to the better." ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 107 (1982).

88. James J. Kilpatrick notes that "occasional abuses are part of the price we willingly pay for freedom of religion, freedom of thought, freedom of mind to seek the truth and happiness in individual ways. The benefits of diversity far exceed the supposed advantages of uniformity." James J. Kilpatrick, *Kentucky Court Decision Hailed*, THE DAILY TIMES, November 18, 1979, at 4a.