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# Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education

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# COMMENTS

# Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education

## INTRODUCTION

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[1] The truth of this observation, made a quarter of a century ago by the Supreme Court in *Brown v. Board of Education,* remains obvious today. But the recent emergence of fundamentalist Christian schools which oppose all forms of state regulation has severely threatened the ability of a state to guarantee to *all* its children the opportunity for a quality education. One report has estimated that, as a reaction to integration and because of a disdain for the "secular, humanistic values" being taught in the public schools, some 5,000 fundamentalist schools have "sprung up in the past few years."[2]

The fundamentalists' legal argument against state regulation is based primarily upon the free exercise clause of the first amendment, applicable to states through the fourteenth.[3] Challenges to state regulation have met mixed results in the courts; courts in Ohio and Kentucky, for example, have ruled in favor of the schools, while a North Carolina court has ruled against them.[4]

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] The Louisville Courier-Journal, Feb. 4, 1979, § G, at 7, col. 1.

[3] The first amendment's religion clauses prevent Congress from passing a law "respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. AMEND. I. Both prohibitions apply to the states through the fourteenth amendment. Everson v. Bd. of Educ. 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise clause).

[4] Hinton v. Ky. St. Bd. of Educ., No. 88314 (Franklin Cir. Ct. Div. I, Oct. 4, 1978), *appeal docketed sub nom.* Ky. St. Bd. for Secondary and Elementary Educ. v. Rudasill, No. 78-SC-642-T (Ky. Sup. Ct. Jan. 8, 1979) [hereinafter cited as *Hinton*]; State

The Kentucky case, *Hinton v. Kentucky State Board of Education,*[5] is particularly worthy of note for two reasons. First, it is the most wide-sweeping victory to date for the fundamentalist schools.[6] The Kentucky State Board of Education (now the Kentucky State Board For Secondary and Elementary Education) had attempted to force the plaintiff schools to comply with textbook approval requirements, teacher certification requirements, curriculum requirements, and certain other minimum standards for accreditation.[7] The court ruled that the imposition of each of these violated the free exercise clause.[8]

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v. Columbus Christian Academy, No. 78-C.V.S. 1678 (Wake Co. Superior Cir. Ct., Sept. 1, 1978). *See* The Louisville Courier-Journal, Feb. 4, 1979, § G, at 7, col. 1.

[5] The plaintiffs here were "36 individuals [pastors and parents], five Christian schools, and one association of [18] Christian schools." *Hinton,* Brief for Defendants at 3. The suit was brought specifically to obtain an order enjoining the state from enforcing its compulsory attendance law that requires parents to send children ages 7-16 to an accredited school, and, indirectly, to prevent the state from enforcing its accreditation requirements against these religious schools.

[6] The Kentucky court invalidated all regulation of the *teaching* performed in these schools. *See* notes 7-9 and accompanying text *infra* for a brief summary of the court's holding. The Ohio Supreme Court in State v. Whisner, 351 N.E.2d 750 (Ohio 1976), did not go as far. *See* Note, *Constitutional Law—Public Regulation of Private Religious Schools,* 37 OHIO ST. L.J. 899, 925 (1976).

[7] This Comment will deal only with the teacher, textbook, and curriculum requirements.

KY. REV. STAT. § 156.445 (1970) [hereinafter cited as KRS] provides that "[n]o textbook shall be used in any *public* school in Kentucky as a basal text unless it has been approved and listed on the state multiple list of textbooks by the state textbook commission." (emphasis added). State education officials have interpreted this as applying to private schools as well. *Hinton,* Findings of Fact No. 50, at 7; Brief for Plaintiffs at 26-27; Brief for Defendants at 14-15. If a school wishes to use a basal text not on the "list" it must obtain approval from the state. *Hinton,* Findings of Fact, Nos. 57, 61, at 8-9; Brief for Plaintiffs at 27; Brief for Defendants at 14-15.

While all schools are required to use only teachers certified by the state, the only requirement for certification to teach in a private school is a Bachelor's degree from an accredited college or university. KRS § 161.030 (1) (1970).

The plaintiffs also specifically objected to curriculum guidelines adopted pursuant to KRS § 156.160(2) (Supp. 1978) as well as several of the standards contained in Standards for Accrediting Kentucky Schools, 704 KY. AD. REG. § 10.022 (1978). Brief for Plaintiffs at 29-36. The state has admitted that some of the standards are vague. *Hinton,* Findings of Fact No. 54, at 7.

[8] *Hinton,* Conclusion of Law No. 1, at 11-12. The court also ruled that the regulations violated the first amendment's establishment clause and section 5 of the Kentucky Constitution. *Hinton,* Conclusions of Law Nos. 2, 3, at 12. Only the free exercise issue will be discussed at length in this Comment.

For a law to withstand an attack under the establishment clause, it must have a secular purpose, a principal effect neither advancing nor inhibiting religion, and no excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz

Second, the *Hinton* court's approach to the problems of free exercise of religion and quality education was unique: by holding that the schools' use of standardized tests was sufficient protection for the state's interest in the education of its children,[9] the court only paid lip service to the need for quality education. This Comment will analyze the free exercise claim advanced in *Hinton* and examine the desirability of using uniform test scores as the sole measure of a school's performance.

## I. THE FREE EXERCISE CLAIM[10]

In analyzing any free exercise claim, the courts must be

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v. Tax Commission, 397 U.S. 664 (1969). The gist of the claim in *Hinton* was that the regulations represent an excessive entanglement.

While the Supreme Court has never struck down a law under the establishment clause where there was *regulation of* instead of *aid to,* religion, such a claim could be justified under at least two theories. First, regulation could be characterized as an establishment of non-religion; second, the establishment clause could arguably mandate total separation of church and state, with the key word being "respecting" an establishment of religion. For a seventh circuit case striking down a regulation under the establishment clause, though without a detailed explanation, see Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

In neither *Lemon* nor *Walz* did the Supreme Court adopt a balancing approach to the establishment clause claim. An implication of this is that a regulation which involves "excessive entanglement" will not be saved by a showing of a compelling state interest. The court in *Hinton* seemed confused on this point, saying, "Any such entanglement in religious matters, absent a compelling State interest, is forbidden." *Hinton* at 3. Perhaps that confusion explains the court's readiness to find an excessive entanglement.

The Kentucky constitutional claim involves substantially the same issues as the first amendment claims. *Hinton,* Brief for Plaintiffs at 57. One clause of the Kentucky Constitution, however, is particularly important: "[N]or shall any man be compelled to send his child to any school to which he may be conscientiously opposed." KY. CONST. § 5. Since this clause was written when education for every child was not as vital as it is today, the Kentucky courts should interpret it as being conditional, requiring a balancing of interests, rather than absolute. If they cannot in good conscience do so, the clause should be repealed. (Many other parts of the Kentucky Constitution are out of step with modern reality. *See, e.g.,* KY. CONST. § 187, which provides for "separate schools for white and colored children.").

The significance of the § 5 claim is that it may keep *Hinton* from reaching the United States Supreme Court. If the Kentucky Supreme Court rules for the fundamentalist schools on the issue, the case will not be reviewable because of the "adequate and independent state grounds" doctrine. *See* Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

[9] *Hinton* at 2.

[10] For an excellent discussion of the history and current status of the free exercise clause, see Riga, *Yoder and Free Exercise,* 6 J.L. AND EDUC. 449 (1977). *See also* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause,* 1973 DUKE L.J. 1217.

careful not to "overprotect" religion. Such overprotection might be equivalent to establishing religion, a practice that is forbidden by the first amendment.[11] The two religion clauses are, thus, to a degree, inconsistent. As the Court noted in *Walz v. Tax Commission,*[12] "[I]f expanded to a logical extreme, [either] would tend to clash with the other."[13] Thus, in determining the interference with a fundamentalist Christian school's free exercise, courts must examine the burdens on religion carefully, and not carry the free exercise clause to such extremes as to infringe upon the establishment clause.

In making their free exercise claim, the fundamentalist schools rely heavily upon the landmark case of *Wisconsin v. Yoder.*[14] There, the Supreme Court held unconstitutional Wisconsin's compulsory education law as it was applied to Amish children who were beyond the eighth grade. The burden on the free exercise of the Amish, a strict religious sect, was severe; the eventual destruction of their sect was likely if they were not exempted.[15] On the other hand, the state's interest in one or two years of education beyond the eighth grade was not great, particularly since Amish teenagers were getting practical experience in farming and the Amish people had always been self-supporting.[16]

The *Yoder* Court applied a three-pronged balancing test, which had been established in *Sherbert v. Verner,*[17] and held that this minimal state interest did not justify such a severe burden on the Amish people.[18] This balancing test, the relevant

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[11] *See* note 8 *supra* for a brief discussion of the establishment clause claim.

[12] 397 U.S. 664 (1970).

[13] *Id.* at 668-69. For example, a prohibition of all governmental aid to religious schools on establishment clause grounds would likely force many of them to close, thus burdening their free exercise. Likewise, a wholesale granting of exemptions from general laws because of a religion's claim of free exercise would, to a degree, be an establishment of that religion.

[14] 406 U.S. 205 (1972). *Hinton* and *Yoder* have more in common than legal theories. The religious claimants were represented by the same attorney, William B. Ball, and used the same expert witness, Dr. Donald Erickson.

[15] *Id.* at 219.

[16] In fact, the Amish convinced the Court that the incremental year or two of formal education "in place of their long-establised program of informal vocational education would do little to serve [the state's] interest." *Id.* at 222.

[17] 374 U.S. 398 (1963).

[18] 406 U.S. 205, 236 (1972). *Yoder* prompted immediate comment in a number of law journals. *See, e.g.,* Note, *Freedom of Religion and Compulsory Education,* 26 ARK. L. REV. 555 (1973); Note, *Wisconsin v. Yoder: The Right to be Different — First*

test in any free exercise case, has been stated simply:

> [I]f the individual demonstrates that his actions are sincerely religious and have been interfered with as a result of a state regulation, the state must demonstrate that it has a compelling interest in the regulation, an interest which could not be promoted by any less restrictive means.[19]

Another analysis would weigh a free exercise claim according to two factors: "first, the sincerity and *importance* of the religious practice for which special protection is claimed; and second, the *degree* to which the governmental regulation interferes with that practice."[20] While the Supreme Court has never expressly accepted such an approach, a weighing of the importance of the religious practice and the degree of the burden is implicit in any balancing of interests. Language from *Yoder* bears this out:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital

*Amendment Exemption for Amish under the Free Exercise Clause,* 22 DEPAUL L. REV. 539 (1972); Recent Decisions, *Constitutional Law — Free Exercise of Religion,* 11 DUQ. L. REV. 433 (1973); Note, *The Amish Prevail Over Compulsory Education Laws: Wisconsin v. Yoder,* 26 Sw. L.J. 912 (1972).

*Yoder* illustrates the continued change in the application of the free exercise clause. Only six years before *Yoder,* a nearly identical claim was involved in a case to which the Supreme Court denied certiorari. See State v. Garber, 419 P.2d 896 (Kan. 1966), *cert. denied,* 389 U.S. 51 (1967). For an analysis of *Garber,* see Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber,* 16 KAN. L. REV. 423 (1968).

[19] Marcus, *supra* note 10, at 1242. Marcus' statement of the *Sherbert/Yoder* test is the most succinct found by this author. In *Yoder,* the state agreed that the Amish beliefs were sincerely religious. Wisconsin v. Yoder, 406 U.S. 205, 209 (1972). The Court went on to say:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade . . . it must appear either that 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.

*Id.* at 214. The "less restrictive means" part of the test comes from the *Yoder* Court's statement that "only those interests . . . not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

[20] Giannella, *Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1390 (1967) (emphasis added). For a discussion of this proposed test, see Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 329-344 (1969).

it may be to the protection of values promoted by the right of free exercise.[21]

The negative implication of this is that the "danger" of violating the establishment clause could prevent an exception which is not "vital," meaning, of course, where there is no real need for protection of the values or practices being burdened by regulation. For this reason, the Court in *Yoder* went to great lengths to point out that compulsory school attendance beyond the eighth grade would not merely offend the Amish "subjective" tenets, but would also pose "a very real threat of undermining the Amish community and religious practice as they exist today."[22] Certainly, this high degree of interference with a very important practice justified an "exception from the general obligation of citizenship"[23] and outweighed the potential establishment clause claim. It is imperative that the fundamentalist Christian schools' alleged burden be analyzed in light of these considerations.

While courts have occasionally ruled in favor of state regulation on the ground that the belief underlying the burdened action was not a sincere, religious one,[24] the state in *Hinton* did not dispute the sincerity or religious nature of the plaintiffs' beliefs.[25] Rather, it concentrated on the other two prongs of the test, the interference with free exercise and the state's interest in the regulation.

### A. *Interference With Free Exercise*

If interference with religion can be found, the state must not only have a compelling interest to justify interference, it must also promote that interest by the least restrictive means. Simplified, the alleged interference in *Hinton* can be viewed at two levels: first, that the parents' right to guide their children

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[21] 406 U.S. at 220-21.

[22] *Id.* at 218.

[23] *Id.* at 221.

[24] *See, e.g.,* Brown v. Dade Christian Schools Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 98 S.Ct. 1235 (1978) (racial segregation is not a religious belief); McCartney v. Austin, 293 N.Y.S.2d 188 (Sup. Ct. 1968) (required polio vaccine not in violation of religious belief of a Catholic). For a criticism of *Brown* see Note, *A Sectarian School Asserts Its Religious Beliefs: Have the Courts Narrowed the Constitutional Right to Free Exercise of Religion?,* 32 U. MIAMI L. REV. 709 (1978).

[25] *Hinton,* Brief for Defendants at 5-6.

intellectually and religiously, an important right which has been protected by a long line of cases,[26] had been burdened; second, that their right to do this *without any governmental regulation* had been absolutely denied.

In arguing against *any* governmental regulation, the plaintiffs claimed that their schools were an arm of their religious mission, that they believed in total separation of church and state, and that regulation of their teaching made them choose between following their religious tenets or complying with the regulation.[27] Thus, any regulation was a burden on their free exercise, requiring a showing of a compelling state interest.[28] The school's submission to health, fire, and safety standards would seem to be inconsistent with such a claim. The plaintiffs distinguished this type of regulation from the opposed regulations: the health, fire, and safety standards were not directly related to their teaching mission.[29] The state forcefully advanced what the court termed, "[a] worldly view that religious education is severable from secular,"[30] and that the secular function of these schools authorized state regulation.[31] This separation argument was soundly rejected,[32] as it has been in several cases dealing with aid to religious schools.[33]

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[26] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Everson v. Bd. of Educ., 330 U.S. 1 (1947); Pierce v. Society of Sisters, 268 U.S. 510 (1927).

[27] *Hinton*, Brief for Plaintiffs at 21-22.

[28] *Hinton*, Brief for Plaintiffs at 21-22; *Hinton*, Findings of Fact Nos. 3, 11, 12, 80, at 1, 2, 11.

[29] *Hinton*, Closing Arguments at 28-29 (Ball for Plaintiff). The court explained the Plaintiffs' compliance with these standards in a different manner: "Plaintiffs here admit—judicially—the State's overriding interest in maintaining reasonable health, fire and safety standards for all schools." *Hinton* at 2.

[30] *Hinton* at 2.

[31] *Hinton*, Closing Arguments at 41-42 (Combs for Defendant).

[32] *Hinton* at 2-3; Findings of Fact No. 16, at 3.

[33] *See, e.g.*, Meek v. Pittinger, 421 U.S. 349, 365 (1975), where the Court said, "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church-related schools." *See also* Lemon v. Kurtzman, 403 U.S. 602, 634-35 (1971) (Douglas, J., concurring):

> It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. Rev. Joseph H. Fichter, S.J., stated in Parochial School: A Sociological Study 86 (1958):
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> " . . . Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and

While it is unclear in *Hinton* how much consideration was given to this argument against *any* regulation, courts faced with such arguments must exercise the utmost caution. Requiring a state to justify with a compelling interest any law dealing with a particular subject merely because of a general belief, however sincere or religious, that there should be *no* law is surely approaching the forbidden logical extreme.[34] For example, a person may assert that his entire life reflects his religious convictions and is a part of his religious mission. If accepted, that assertion could require a state either to justify with a compelling interest any law affecting that person or to exempt him from that law. Such an extreme result cannot be tolerated, even in the name of religious freedom. Thus, the ultimate solution in *Hinton* should not have rested upon general arguments against any form of regulation; the analysis should have focused instead on the actual burdens imposed by these particular regulations. The fundamentalist schools, probably anticipating such an argument, did attempt to prove that the specific regulations discussed below were actual, significant burdens on their free exercise of religion.

1. *The Teacher Certification Requirement*

The schools claimed that the teacher certification requirement interfered with their actual teaching in two ways: first, that there were few teachers available who had a Bachelor's degree, as required by the state, and who met the religious standards of these schools;[35] and second, that the schools could not afford to hire teachers with Bachelor's degrees.[36]

The state characterized the first argument as a merely

sisters will be needed to convert and care for the hundred million non-Catholics in the United States?'"

[34] *See* note 13 *supra* for a brief discussion of one problem that could be caused by such an extreme position.

[35] *Hinton*, Brief for Plaintiffs at 28; *Hinton*, Brief for Defendants at 12 (quoting testimony of Rev. Goodell of the Frankfort Baptist Tabernacle, in *Hinton*, transcript vol. I, 26-28). These standards include a belief that the person will go to heaven when he dies, a strong belief in separation of church and state, and abstinence from drinking, smoking, using profanity, and following "the world's standards of dress and conduct." *Hinton*, Brief for Defendant at 11-12 (quoting testimony of Rev. Goodell, in *Hinton*, transcript vol. I, 16-17).

[36] *Hinton*, Brief for Defendants at 12 (quoting testimony of Rev. Goodell, in *Hinton*, transcript vol. I, 26-28).

speculative "fear . . . which so far has not been borne out by experience."[37] Without some evidence that the plaintiffs' fear was justified, the court could not base its decision on such speculation and apparently did not do so.[38]

The second argument was a bit more persuasive. While the Supreme Court has held that a purely financial burden will not support a free exercise claim,[39] in *Hinton* the claim was that the financial burden was so severe as to be prohibitive; not only would it cost the schools money to comply with the regulation, it would cost them so much that they could not operate and thus would not be able to exercise their religious beliefs. Surely such a burden, if proven, would weigh heavily in a balancing test.

The court accepted the financial argument, to a degree, saying: "Compliance . . . would be financially impossible for *some* of the [schools]."[40] Still, since compliance would not be impossible for *all* the schools, a portion of the holding must have been based upon the plaintiffs' general opposition to all regulation of their teaching.[41]

### 2. *The Textbook Approval Requirement*

The plaintiffs also claimed that the textbook approval requirement interfered with their actual teaching because some of the approved texts omitted materials which their religion required them to teach, while others included material to which they were religiously opposed.[42] The state countered, saying that the schools were not required to teach all material contained in the texts and could cure omissions by using supplemental texts, which would require no approval.[43] More sig-

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[37] *Id.* at 13.

[38] There is no mention in the court's opinion or in its 81 separate findings of fact of a shortage of teachers.

[39] Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961).

[40] *Hinton,* Findings of Fact No. 6, at 2 (emphasis added).

[41] For a discussion of this general opposition, *see* notes 26-34 and accompanying text *supra.*

[42] *Hinton,* Findings of Fact No. 60, at 8.

[43] *Hinton,* Brief for Defendants at 15. KRS § 156.445 (1971) requires approval of basal texts only. The fact that objectionable material is in some of the required texts is important, however, even if it is not taught, since the students would have ready access to it. One possible, though certainly not perfect, solution would be for the schools to "black out" objectionable material.

nificantly, the textbook commission had a flexible policy of adopting alternative texts not on the list, a policy of which these schools had not attempted to take advantage.[44] Thus, the only burden the plaintiffs showed in *Hinton*, beyond their general opposition to any regulation of textbooks, was that they would have to submit their textbooks for approval, to go through a process to have them approved. Certainly this small burden should not weigh too heavily in any balancing test, unless and until such texts have been submitted and rejected. Such a burden is much less than the financial one claimed with respect to teacher certification. Note that the burden there could, conceivably, cause the demise of at least some of the schools. Thus, if proven to exist, that burden is surely a great one. On the other hand, the burden of merely submitting textbooks for approval is a light one, especially so in light of the flexible policies of the state.

### 3. *Curriculum Requirements*

The fundamentalist schools, while agreeing to offer proof that they were teaching all the basic subjects,[45] balked at the state's imposition of curriculum requirements in the form of "Carnegie Units."[46] This constitutional challenge should not have succeeded in *Hinton* because the required curriculum plan in Kentucky leaves plenty of time for religious schools to teach whatever they desire.[47] However, separate classes in religion are not even taught in these schools, "rather religious doctrines and examples are interwoven with all other sub-

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[44] *Hinton*, Brief for Defendants at 14. A statute mandating that a satisfactory text not be rejected solely because it contains elements of religion is scheduled to take effect July 1, 1979. KRS § 156.445(2) (Supp. 1978). The officials involved appear willing to implement the spirit of this statute immediately. *Hinton*, Brief for Defendants at 14-15.

[45] *Hinton*, Findings of Fact No. 33, at 5.

[46] *Hinton*, Brief for Defendants at 16. The state requires that secondary schools give each student 10 units of instruction in required courses. This translates to an average of two and one half hours per day, if the student spends the traditional 4 years in secondary school. The only requirement for non-secondary schools is that the basic subjects be taught. *Id.* The schools have agreed to teach these basic subjects. *Hinton*, Findings of Fact No. 33, at 5.

[47] Kentucky's curriculum requirements differ in this respect from those involved in State v. Whisner, 351 N.E.2d 750 (Ohio 1976). The Ohio Supreme Court in *Whisner* struck down a curriculum plan which allocated practically the entire school day to secular subjects. *Id.* at 765. For an analysis of the case, *see* Note, *supra* note 6. *See* note 46 *supra* for a discussion of Kentucky's curriculum requirments.

jects."[48] Since these plaintiffs claimed that their religious mission is *teaching* secular as well as religious subjects, any curriculum plan could be said to interfere with that mission. Such an argument goes too far toward making *any* regulation a burden on religion. When the bulk of the school day is available for the schools to teach what they wish and when religious teachings can be interwoven with certain subjects that are required by the curriculum, the burden on religion seems minimal.

The state pointed out that several fundamentalist churches—Seventh Day Adventist, Disciples of Christ, and Southern Baptist—and Catholics have been operating schools completely within the teacher certification, curriculum, and textbook requirements without being burdened.[49] Further, two of the plaintiff schools had been approved without any noticeable "interfer[ence] with their religious freedom."[50] Although the fact that most church schools can operate within these requirements without feeling burdened does not inevitably lead to the conclusion that all church schools can do so, this fact should cause courts to be more skeptical when a burden is alleged. The courts should require the schools to prove a specific, significant burden. In *Hinton,* that burden simply was not proven.

B. *The State's Interest in Education*

If the party advancing a free exercise claim proves a significant burden, the *Sherbert/Yoder* test requires a state to justify its law by showing a compelling state interest.[51] *Yoder* held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[52] Even the most staunch advocates of parental rights and freedom of religion agree that, at some point, the state may circumvent the parents in order to protect the chil-

[48] *Hinton,* Findings of Fact No. 16, at 3. Even accepting the plaintiffs' argument that teaching secular subjects is also a part of their exercise of religion, the Kentucky curriculum requirements surely do not pose a significant burden, particularly since these schools have agreed to teach the basic subjects.

[49] *Hinton,* Brief for Defendant at 17-18; *Hinton,* Closing Arguments at 44 (Combs for Defendant).

[50] *Hinton,* Closing Arguments at 44 (Combs for Defendant).

[51] *See* text accompanying note 19 *supra* for this balancing test.

[52] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

dren.[53] The *Yoder* Court accepted the proposition that the state has an important interest in "some degree of education" to prepare children both to participate in our political system and to be self-supporting members of society.[54]

Earlier cases, while recognizing the rights of parents to send their children to private schools, have consistently accepted a state's right to regulate those schools reasonably.[55] The fundamentalist schools in *Hinton* argued that the specific regulations did not advance any compelling interest because the state had not proven any relationship between the regulations and the goal of a quality education.[56]

While the state failed to *prove* that these regulations ensure quality education, the reason is obvious: such a showing is impossible. As one scholar discovered in analyzing attempts to evaluate teaching materials, "[I]t is not presently possible to measure improvement in learning."[57] If "quality education" is defined as something more than mere "learning" the problem increases in complexity. And if "teacher competence" is defined as the ability to educate children, the difficulty in measuring the quality of a teacher is equally clear.[58] If the state is required to prove with empirical evidence that its regulations advance the compelling interest of education, it simply cannot do so.

Still, there are some things that can logically be assumed

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[53] *See, e.g.*, Marcus, *supra* note 10, at 1230. The recent tragedy at Jonestown, Guyana, where members of a religious sect poisoned their children and then themselves, indicates the need for state intervention at some point. The question is: When is that point reached?

[54] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). For an analysis of the state's interest in education, see Riga, *supra* note 10, at 460.

[55] *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Even in Lemon v. Kurtzman, 403 U.S. 602 (1970), a case relied upon heavily by the *Hinton* plaintiffs in their establishment clause claim, the Court acknowledged that "[a] State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.* at 613.

[56] *Hinton*, Brief for Plaintiff at 27-31. The court agreed: "[T]he evidence taken in this case fails to demonstrate more than a scintilla of 'colorable state interest' subserved by [these regulations]." *Hinton* at 1.

[57] Jacobs, *Quality Control for Instruction Materials*, 12 HARV. J. LEGIS. 511, 550 (1975).

[58] Teachers are beginning to challenge certification requirements as being unrelated to teaching ability. *See, e.g.*, Georgia Ass'n of Educators v. Nix, 407 F.Supp. 1102 (N.D.Ga. 1976); United States v. North Carolina, 400 F.Supp. 343 (E.D.N.C. 1975).

without empirical evidence.[59] It can be assumed that a textbook approved as thoroughly covering an important subject will be a better teaching aid than no textbook, or one which does not thoroughly cover the material. It can also be assumed that a teacher with a college degree will in almost all cases be a better teacher than one with little or no education. The teacher with a college degree, has, at the very least, demonstrated the mastery of certain basic skills.[60]

So despite the court's finding that "there is no empirical, demonstrable, or reasonable casual connection . . . between the State's requirements and . . . the guaranteeing of quality education,"[61] there is a *logical* connection. Coupled with the state's interest in education and the difficulty in measuring education, this logical connection should weigh heavily in the balance. Saying that a state must prove that a regulation is necessary to advance a compelling interest is a fine theory but, under these particular facts, difficult to apply. The regulation may be imperfect, but without it the state has no assurance whatsoever that its interest is being protected.[62] Thus, it is the only means to ensure a compelling governmental interest.

## II. STANDARDIZED TESTS AS AN ALTERNATIVE TO REGULATIONS

The plaintiffs in *Hinton* argued successfully that the use of standardized tests sufficiently satisfies the state's interest in education, that the state should "taste the pudding . . . without fussing so much about the recipe."[63] This reasoning ignores a growing body of evidence against the value of such tests.[64]

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[59] Surely church leaders would agree whole-heartedly.

[60] Undoubtedly, more correlation would exist if math teachers were required to have math degrees, history teachers to have history degrees, etc., but that would be more of a burden on private schools. The state has not chosen to go that far, although schools could do so voluntarily.

[61] *Hinton,* Findings of Fact No. 70, at 10.

[62] *See* notes 63-72 and accompanying text *infra* for a discussion of the plaintiffs' suggested alternative protection.

[63] *Hinton,* Brief for Defendant at 20 (quoting Dr. Erickson, witness for the plaintiffs). The court agreed. *Hinton* at 2.

[64] *See, e.g., Report of the NEA Task Force on Testing,* 1975, in STANDARDIZED TESTING ISSUES: TEACHING PERSPECTIVES 81 (1977) (republished on microfiche by Educ. Research Info. Center [hereinafter cited as ERIC], catalog no. ED 146 233). "Throughout its study the Task Force has been especially impressed with the depth of feeling and the weight of evidence against group standardized tests as reliable/valid measures of achievement and intelligence." *Id.* at 83.

Further, it ignores the state's protest that standardized tests could only "be given after the fact, and low scores might reflect needless, and possibly irreparable educational failure."[65] Standardized tests do not measure education. They measure "little more than the ability to recall facts, define words, and do routine calculations . . . , mak[ing] almost no provision for evaluating a student's ability to estimate or measure real things—important skills needed for functioning as workers and citizens."[66] Since the *Yoder* Court accepted the proposition that the state has an interest in education because of the need for "workers and citizens,"[67] it should be clear that standardized tests cannot satisfy the state's interest. While it may be argued that teacher certification, approved textbooks, and a required curriculum do not ensure functioning "workers and citizens," the logical connection between such state requirements and the state purpose—functioning "workers and citizens"—indicates that the state's requirements are more nearly related to the state purpose than is an achievement test.

Even if the standardized tests did measure important skills, they still would not be a valid indicator of a school's performance in teaching since "as much as 80 percent of the variation in pupil achievement across schools (equal to a correlation of about +.90) can be accounted for by [socioeconomic] factors."[68] Thus, the make-up of the student body plays a much larger role in test scores than the performance of the school. Further, the use of standardized tests as a means of accrediting private schools provides an inherent incentive for those schools to discriminate in admissions against those who traditionally do poorly on such tests—the poor and the cultural minorities.[69]

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[65] *Hinton*, Brief for Defendants at 21.

[66] McKenna, *What's Wrong With Standardized Testing?* in STANDARDIZED TESTING ISSUES: TEACHING PERSPECTIVES 7, 8 (1977) (republished on microfiche by ERIC, catalog no. ED 146 233).

[67] *See* text accompanying notes 14-16 *supra* for a discussion of *Yoder*.

[68] Soar & Soar, *Problems in Using Pupil Outcomes For Teacher Evaluation*, in STANDARDIZED TESTING ISSUES: TEACHING PERSPECTIVES 53, 53 (1977) (republished on microfiche by ERIC, catalog no. ED 146 233).

[69] The fact that these groups do poorly on standardized tests is virtually undisputed. *See, e.g.*, McClung, *Competency Testing: Potential For Discrimination*, 11 CLEARINGHOUSE L. REV. 439 (1977); Mercer, *Sociocultural Factors in the Education of Black and Chicano Children*, in STANDARDIZED TESTING ISSUES: TEACHERS PERSPECTIVE 67 (1977) (republished on microfiche by ERIC, catalog no. ED 146 233); Pascale, *The Impossible Dream: A Culture-Free Test*, (1971) (republished on microfiche by ERIC, catalog no. ED 054 217).

Perhaps the greatest weakness of the tests, even if they could measure both important skills and the school's performance, is that they can still only be used after the fact. While the court in *Hinton* gave no guidance as to what the state may do if students do not perform satisfactorily on the tests, surely no one would argue that the state should be allowed to close the school immediately. Any meaningful evaluation would take time. One writer has suggested that, due to cultural influences in the tests, a reliable measure of a teacher's performance (or, of course, that of a school) would require testing classes over a twenty-year period.[70] The state must have some assurance that its interest is being protected in the meantime.

Many reservations have been voiced about the use of standardized tests and the National Education Association (NEA) has advocated abolition of their use altogether.[71] The court in *Hinton* turned to these tests in a noble effort to strike a balance between free exercise and the state's interest in education. That balance is out of kilter, however. "H.L. Mencken once commented, 'There's always a well-known solution to every human problem— neat, plausible, and wrong.' The use of pupil achievement tests as a way of evaluating the teacher, the school, or the school system embodies this misleading simplicity."[72]

## CONCLUSION

The state in *Hinton* produced evidence at trial that some schools have been established "by parents and other persons with no known previous educational background or experience."[73] Without the power to mandate minimum standards for these schools, the state has no protection of its important and valid interest in ensuring the opportunity for quality education for all its children. Standardized tests are not an acceptable substitute. *Hinton,* therefore, should be reversed.[74]

*Michael D. Baker*

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[70] Soar & Soar, *supra* note 68.

[71] *NEA Resolution on Standardized Tests* 76-65 in STANDARDIZED TESTING ISSUES: TEACHER PERSPECTIVES 64, 64 (1977) (republished on microfiche by ERIC, catalog no. ED 146 233).

[72] Soar & Soar, *supra* note 68, at 53.

[73] *Hinton,* Brief for Defendant at 13.

[74] In a procedure bypassing the Court of Appeals, the Kentucky Supreme Court will hear the *Hinton* appeal *sub nom.* Kentucky State Board for Secondary and Elementary Education v. Rudasill, No. 78-SC-642-T (Ky. Jan. 8, 1979).