Mississippi College Law Review

Volume 9
Issue 1 *Vol. 9 Iss. 1*

Article 6

1989

Train up a Child in the Way He Should Go: State Regulation of Private Religious Education

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Custom Citation
9 Miss. C. L. Rev. 101 (1988-1989)

"TRAIN UP A CHILD IN THE WAY HE SHOULD GO": STATE REGULATION OF PRIVATE RELIGIOUS EDUCATION

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If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . If there are any circumstances which permit an exception they do not occur to us.

—Justice Jackson[1]

I. INTRODUCTION

Without doubt, education is a major function of modern American government. All fifty states have a public school system and practically all have compulsory education laws.[2] At the federal level the Secretary of Education is a cabinet level official. The Supreme Court has said that "[p]roviding public schools ranks at the apex of the function of a State."[3] Education, however, is also very important to parents because the subject goes to the heart of what many parents consider a fundamental right: rearing their children as they think best.

Because parents often disagree with state officials about the structure and content of the public school system, many parents opt to remove their children from the public school system and instead to use private education programs. Christian religious conviction is often (though far from always) the motivation of the parents who object to the public schools. Parents with strong religious convictions often feel that educating their children in an environment where religious emphasis is a consistent and integrated part of the learning process is a vital point to which their religion directly speaks. The issue for these parents is often one of sin and righteousness; if God has spoken, then there is little room for debate in their minds.[4] These parents basically want the state education officials to leave them alone to provide their children education as they see fit (and, presently, at their own expense).[5]

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

2. *See* W. VALENTE, LAW IN THE SCHOOLS 24-25 (1980). For a more recent compilation, see Klicka, *Home Statute Chart of the 50 States* (May 1987) (available from Home School Legal Defense Association, 731 Walker Road, Suite E-2, Great Falls, VA 22066). For a general history of compulsory education in the United States, see Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355 (1966).

3. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

4. *See, e.g.*, New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 293, 297 (D. Mass. 1987) (Plaintiffs were Christians who "believe that they are obligated by God to provide as an indispensable ministry of their church a school which teaches their religious beliefs . . . . Plaintiffs believe they are forbidden to send their children to schools, such as public schools, which they believe teach doctrines contrary to the Holy Scriptures."); State v. Patzer, 382 N.W.2d 631, 633, *cert. denied*, 479 U.S. 825 (1986) (The "parents essentially believe that God has given them sole responsibility to educate their children.").

5. For a developed argument that parental control rather than state control of education is a major premise of Christian belief, see Titus, *Education: Caesar's or God's: Constitutional Question of Jurisdiction*, J. CHRIST. JURIS. 101 (1982).

The state, on the other hand, perceives that its interest in education extends to private education programs as well as public education. The two state interests in education which the Supreme Court has recognized are: (1) ensuring that children receive the basic skills to be self-reliant, competent citizens,[6] and (2) inculcating in children the values essential for democracy.[7] These interests (and especially the latter) are sometimes contrary to the values of the parents' Christian faith. As a result, conflict is inevitable. The state claims that its interests must be met even if it means overriding parental choice, and the parents claim that the state action overriding their choice violates their religious freedom under the first amendment. These conflicts have been and continue to be the focus of legal battles across the country.[8]

This article shall examine these conflicts between separatist parents and the state. Specifically, this article shall consider whether, and to what extent, the state can regulate private Christian education programs in light of the first amendment free exercise clause. Part II will first define and describe the struggle between the parents and the state as one for the right to control, or at least have the greatest influence over, what children believe. Part III will then examine the legal test the courts currently use in free exercise clause cases under the first amendment. The conclusion reached is that the current standard is not protective enough of parental liberty and, as a result, a revised standard is necessary. The final segment, Part IV, suggests a revised standard based on principles drawn from the jurisprudence of the first amendment free speech clause.

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6. *See Yoder*, 406 U.S. at 221-22.

7. *See* Bethel School Dist. v. Frazer, 478 U.S. 675, 681-86 (1986); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

8. For a sampling of the cases, see, *e.g.*, Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987); New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 297 (D. Mass. 1987); Nebraska *ex rel.* Douglas v. First Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981); Kentucky State Bd. v. Rudasill, 589 S.W.2d 877 (1979), *cert. denied*, 446 U.S. 938 (1980); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

Many of the disputes between separatist parents and the states involve conflicts about the legality of home schools. *See, e.g.*, Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983); Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987); State v. Patzer, 382 N.W.2d 631, *cert. denied*, 479 U.S. 825 (1986); Delconte v. State, 313 N.C. 384, 329 S.E.2d 636 (1985).

From August 1986 through May 1987, the Home School Legal Defense Association, a legal defense fund, helped 353 families (who wanted to home school their children) in their contacts with public school officials or state attorneys. Of these 353 contacts, 37 had either been resolved in court or were presently in court as of spring 1987. *Contact Countdown*, 13 THE HOME SCH. CT. REP. 2 (Mar.-Jun. 1987).

For two views of home education, see Lines, *An Overview of Home Instruction*, PHI DELTA KAPPAN, Mar. 1987, at 510, 517; Zirkel, *Defense of Home Instruction 'Not Warranted,'* EDUC. WEEK, Oct. 30, 1985, at 19.

II. WHO WILL CONTROL WHAT THE CHILD IS TAUGHT?

A. A Struggle for the Power to Control Belief Formation

At the most fundamental level, the battle between the state and parents for control of the child's education is a struggle to influence how the child thinks, and thus the battle is really a struggle for power. Social scientists have long understood that power is the essence of social science,[9] and by far the most potent and the most significant instrument of power is the ability to control what other people believe.[10] Whoever controls what a child learns has tremendous impact on the formation of the child's beliefs.

Both the state and Christian doctrine recognize the importance of formal education in the power struggle. In the landmark case of *Pierce v. Society of Sisters,*[11] the Supreme Court recognized that allowing the state to mandate compulsory education in public schools only would make the child the "mere creature of the state,"[12] and thus the Court struck down Oregon's compulsory education law. In the more recent case of *Wisconsin v. Yoder*[13] concerning the Amish people, the Supreme Court recognized that complete state control of education would likely destroy the Amish way of life.[14] Moreover, the Supreme Court has given indirect tribute to the power of religious education to influence belief by finding that merely the symbolic effect of having secular education and sectarian education occurring in the same building is likely to further religion in the minds of impressionable young children.[15]

For Christian parents, the recognition of the power of belief formation is found directly in the Bible. The Apostle Paul wrote that Christians should "be not conformed to this world: but be ye transformed by the renewing of your mind, that ye may prove what is that good, and acceptable, and perfect, will of God."[16] Likewise, the writer of *Proverbs* wrote: "For as he thinketh in his heart, so is he . . . ."[17] Christ himself said, "whosoever believeth [in me shall] not perish, but [shall] have everlasting life."[18] An oft-quoted passage that connects the formation of belief with education is: "Train up a child in the way

9. *See generally* A. BERLE, POWER (1969); J. GALBRAITH, THE ANATOMY OF POWER (1983); B. RUSSELL, POWER: A NEW SOCIAL ANALYSIS (1938).

10. John Kenneth Galbraith, for example, argues that women and men on both sides of the feminist movement fight the most difficult battle not at the level of compensation and equal opportunity laws but rather at the level of belief. *See* J. GALBRAITH, *supra* note 9, at 4-5.

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

12. *Id.* at 535.

13. 406 U.S. 205 (1972).

14. *Id.* at 218.

15. *See* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-92 (1985) (holding in part that the provision of government funded special instruction in religious school buildings creates a symbolic link between church and state in the minds of students).

16. *Romans* 12:2.

17. *Proverbs* 23:7.

18. *John* 3:16.

he should go: and when he is old, he will not depart from it."[19] These are but a few of the passages in the Bible which can be used to directly support the overriding importance of belief formation to the Christian parent.[20]

B. The Issue of Children's Rights

On occasion, a commentator will suggest that characterizing the battle for control as one between the state and parents ignores the rights of the child. As an example, the late Justice Douglas argued that parents should not be able exclusively to control what the child is taught, but this right instead belonged to the child himself, and thus the child's view must be canvassed and assessed.[21]

This argument, however, evades the control (or power) issue in the modern education setting. Compulsory education laws presuppose that the child is not in a position to make an informed, wise judgment. By passing compulsory education laws, the state is not saying that the child should control his own educational destiny. Instead, the obvious implication is that a more informed party—the state—must make the decision for the child until a certain age is reached. On this issue, parents who object to state regulation of private education agree with the state; the only disagreement is about who should make the decision—the parents or the state.

C. The Case for Parental Control

In fact, there are very strong reasons for allowing parents to make the decision, the foremost of which is the fact that parents are in the best position to know their child's needs. Parents live with the child and teach him or her to walk, talk, eat, tie shoes, and perform a myriad of other tasks essential to getting along in society. The state, however, by necessity, categorizes children in broad groups. If the child is not "typical," then he or she is liable to be the one who suffers.

Although the state can try through special needs programs to give individualized attention, it is the parent who is in the position to have the most in-depth, and thus most insightful, opinion.[22] In the case of handicapped children, for example, state officials must rely on interview sessions to evaluate the child's needs. As one professional educator who specializes in special education has noted, such sessions are often ineffective because the child will not respond readily to a stranger. As a result, the parent must be relied upon to supply much

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19. *Proverbs* 22:6.
20. *See supra* note 5.
21. *See* Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972).
22. *See* D. SEELEY, EDUCATION THROUGH PARTNERSHIP: MEDIATING STRUCTURES AND EDUCATION 143-44 (1981).

of the relevant information.[23] Children without handicaps also need individualized attention. Since parents, again, are in the best position to give this individualized attention, then it stands to reason that allowing the parent to do so by structuring the child's education will benefit the child and society.

Moreover, it must be remembered that in deciding what is best for the child the issue is not whether parents are perfect, but whether they are more likely to make the better choice than educational experts operating in a bureaucratic institutional setting. As David Seeley in his book, *Education Through Partnership*, notes:

> It bears saying, too, that many public school officials have little experience or expertise in choosing schools for children. Students are usually assigned to public schools by geographic zone and grade level. They often know little about individual records of performance or psychological traits, two important factors in making good decisions for a child. Even incompetent parents usually know a great deal about their children; and more parents than are given credit by experts care very deeply about those they bring into the world.[24]

Parental control also has broader benefits because the family is a fundamental social institution and thus is crucial to the success of other societal functions.[25] When the values a child receives in school conflict with those transmitted by the family, the child's education suffers. As sociologist Sara Lawrence Lightfoot of Harvard University has written:

> If one recognizes the initial social and cultural task assumed by *all* families and their primary *educative* function, then it becomes clear that in order for schools to be productive and comfortable environments for children, they will have to meaningfully incorporate the familial and cultural skills and values learned in homes and communities. When families and schools share similar values, cultural perspectives, educational goals, and modes of expression, then the transposition from family education to schooling is more fluid and less conflictual for the child. On the other hand, when schools and families support dissonant values and goals, and when families and communities are perceived as inadequate and chaotic environments by arrogant and threatened school personnel, then education within families is devalued and systematically excluded from the school culture . . . .
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> Children seem to learn and grow in schools where parents and teachers share similar visions and collaborate on guiding children forward. For a long time, we have understood that the magic of suburban schools is not merely the relative affluence and abundant resources of the citizens (nor their whiteness), but also

23. Telephone interview with Tom Hehir, Director of Special Education in the Boston Public Schools (Feb. 13, 1988).

24. D. SEELEY, *supra* note 22, at 146.

25. For a developed discussion of the family as a social institution, see D. SEELEY, *supra* note 21, at 163-77; *cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (institution of the family deeply rooted in the nation's history and tradition).

> the consonance between what the parents want for their children and what the teachers believe is educationally sound.[26]

Parental control of choice in education will ensure that the child is in an environment where the values of the school personnel coincide with those of the family. Moreover, parental control should strengthen the family unit itself because of the sense of bonding and identity that stems from active involvement in the education process by all members of the family.[27]

The importance of the family is even more paramount if one views cultural pluralism and diversity as beneficial values in society. Although some might argue that public education is pluralistic because of local community control, the facts do not seem to bear this premise out. The original purpose of public education, at least in part, was to assimilate people from different cultures into an Anglo-American culture,[28] and the same is true today in many respects. As an example, many oppose bilingual education in the public schools because it arguably will hamper children's ability to become effective members of American society.[29] Such an attitude presupposes that there is a common culture which distinguishes a person as an American without promoting or violating the values of any individual group. The result, however, is often a watered-down, common denominator type of curriculum and value system which decreases diversity rather than stimulates it.[30] Parental choice in education, however, assumes just the opposite. Rather than seeking a common denominator, parental control allows children to develop in the many individual directions represented by the differing groups in society. As a result, family control of education not only preaches but also actually promotes pluralism.

D. An Adversarial Environment

Perhaps the real tragedy of the power struggle to control how children think is that parents and state educators are working against each other rather than working together. Educators for the most part seem to be dedicated, idealistic people who both believe in the work they perform and have a genuine concern for children. As for parents who want to educate their child in a manner the state educators feel is too unorthodox, the fact that the parents care enough to

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26. S. LIGHTFOOT, WORLDS APART: RELATIONSHIPS BETWEEN FAMILIES AND SCHOOLS 170-171 (1978).

27. *Id.* at 145; *see supra* note 24.

28. *See* S. LIGHTFOOT, *supra* note 26, at 13-15, 56-58.

29. George Gilder, for example, has written: "These actions [i.e., bilingual education] simultaneously undermine the group's entry into American life and culture, segregate it in presumably separate but equal classrooms, often run, according to many reports, by anti-American teachers, and open the group chiefly to two influences: Spanish-speaking politicians with an interest in segregation and Spanish translations of bureaucratic social programs." G. GILDER, WEALTH & POVERTY 151 (1982).

For a summary of federal government action and state government action relating to bilingual education, including state attempts to institute official language policies, see Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987).

30. D. SEELEY, *supra* note 22, at 16-18, 58.

show an active interest in their child's education indicates a level of commitment that should be encouraged. Since both groups are motivated to help the children, one would hope and think that they would use this common ground to support each other even if there is not total agreement. The tragic reality, however, is that educators often view parents as threats.[31]

This attitude on the part of educators has been attributed to many sources, the foremost of which is money. Public schools are funded at a level directly related to the number of children who attend public schools. In most school districts, the number of teachers in a school is determined by the average daily attendance.[32] If more parents opt for private education, as has been the case in recent years,[33] there will be less money and a lower number of teaching positions allocated to public schools. Educators, despite their idealism, surely worry about job security as much as other individuals.

Another suggested source of hostility can be labeled "professional paternalism." To teach in a public school, a person usually needs a minimum of a bachelor's degree; and if he or she is serious about a teaching career, a master's degree is a de facto requirement. Given such educational requirements, it is understandable why professional educators might consider "untrained" parents to be unqualified to make educational decisions about their children's welfare.[34] This paternalistic attitude is even more likely when parents are proposing educational programs radically different from those developed by the public school experts. Rather than accepting the proposed alternative as a legitimate option, the temptation is to view a different proposal as an attack on their competence and the quality of their program.

The hostile relationship and resulting legal confrontations that often develop between educators and parents cannot be blamed solely on these two factors. Many educators undoubtedly do not let such factors influence their judgment but instead act as public servants in the truest sense. Even so, the fact that educators have a substantial financial interest, plus an interest in professional identity, in keeping children in the public education system should raise a warning flag about improper motives or bias that might cause educators to disfavor parental choice that threatens the educators' personal interests. Yet when parents object, these same state educators are the ones who initially decide if the parents

31. *See* S. ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 104-17 (1986).

32. *Id.* at 161-63.

33. Approximately five million students attended nonpublic schools in 1981, and eighty-four percent of these schools were religiously affiliated. M. MCCARTHY, A DELICATE BALANCE: CHURCH, STATE, AND THE SCHOOLS 143-44 (1983). Since 1975, enrollment in nonpublic schools has increased while enrollment in public schools has decreased. D. SEELEY, *supra* note 22, at 257. According to one report, when North Carolina eliminated state programmatic restrictions and teacher qualifications, thirty-two new private schools started within six months. M. MCCARTHY, *supra*, at 147.

34. *See* Lupu, *Home Education, Religious Liberty, and the Separation of Powers: A Comment on* Care and Protection of Charles, 72 MASS. L. REV., Sept. 1987, at 47, 52-53; *see generally* M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 150-71 (1980) (arguing for free access to private education through a voucher plan and describing the resistance from professional educators to such a plan).

are qualified to guide the child's education under standards that give the state educators broad power.

E. The State-Controlled Approval Process

State regulation of private education is common and extensive. States vary in their requirements, but the most contested areas are curriculum controls and teacher certification.[35] Such requirements (and especially the latter type) can present a significant bar to Christian parents who are not members of mainline and thus more wealthy, establishment-oriented denominations, but who yet feel a vital part of their faith, is educating their children in an environment where the entire process—from curriculum content to the role model presented by the teacher—reinforces the particular beliefs of the parents' faith.[36]

Some states simply require that the instruction in private education programs be "equivalent" to that in the public schools[37] and then vest approval authority at the local school board or superintendent level. Massachusetts' method of approving private schools is a case in point. There are no state approval standards in Massachusetts other than very general statutory provisions. Instead, each school district is expected to develop its own specific standards.[38] In the experience of one attorney who has handled several cases for parents attempting to gain approval of private education programs, the result is an administrative nightmare for parents in the state who desire unconventional private education plans such as home schooling. Parents never know what to expect because the responses vary greatly depending on the attitudes and opinions of individual school superintendents.[39]

Part of this problem is directly attributable to the courts. Even when courts

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35. For a compilation of different requirements in different states, see Klicka, *supra* note 2. *See also* D. KRIP AND M. YUDOF, EDUCATIONAL POLICY AND THE LAW 45-46 (1982).

36. *See supra* note 3.

37. In the case of private home schools, for example, seven states (Connecticut, Indiana, Kansas, Maine, New Jersey, Nevada, and South Carolina) require the instruction to be "equivalent." Three states (Maryland, Delaware, and Rhode Island) require the instruction to be "regular and thorough"; two states (Idaho and Michigan) require the instruction to be "comparable." Klicka, *supra* note 2 (summary of the 50 states home school laws as of May, 1987).

Such "equivalent" instruction statutes have been successfully attacked at times as being unconstitutionally vague (*see, e.g.*, Fellowship Baptist Church v. Benton, 815 F.2d 485, 495-96 (8th Cir. 1987)); but in other cases, the requirements have been upheld as providing sufficient guidance. *See* Care and Protection of Charles, 399 Mass. 324, 329-33, 504 N.E.2d 592, 596-98 (1987).

38. Telephone interview with Marien E. Evans, Assistant General Counsel, Boston Public Schools (Nov. 1987). *See also* Memorandum to School Committee Chairpersons from Harold Raynolds, Jr., Massachusetts Commissioner of Education (Apr. 17, 1987) (discussion of individual school districts' authority to regulate home schools); Memorandum to School Committee Chairpersons from John H. Lawson, former Massachusetts Commissioner of Education (Aug. 19, 1982). This latter memorandum is a discussion of individual school districts' authority to approve private schools in general (as opposed to specifically in the home education context). Both of the above-mentioned memoranda are available through the Legal Counsel Office of the Boston Public Schools, 26 Court Street, Boston, MA 02108.

39. Interview with Paul Dillon, Attorney at Law, in Mr. Dillon's office in Falmouth, MA (Jan. 29, 1988).

have vindicated parents' rights in legal battles with state authorities, the method of the vindication has sowed seeds of further confrontation. The recent Massachusetts case of *Care and Protection of Charles*[40] is a good example of this problem. *Charles* involved a Massachusetts couple who wanted to teach their children at home but who could not reach agreement with school officials of the town of Canton, Massachusetts, on the acceptable form of schooling. When the children were held out of school for a semester due to the disagreement, the town instituted "care and protection" proceedings in state court to remove the children from the parents for lack of " 'necessary and proper educational care.' "[41]

The legal standard interpreted by the *Charles* court provided that "every child between the minimum and maximum ages established for school attendance . . . [shall] . . . attend a public day school . . . but such attendance shall not be required . . . of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee."[42] The court held that this approval criterion was not unconstitutionally vague because the superintendent could flesh out the criteria via supplementation from other state laws concerning education.[43] Then the court also held that teacher certification itself cannot be used as a requirement nor can a college degree be required of the parents, but school officials could look at the instructional material to determine what will be taught, the length of the school year, and the competency of the parents to teach. The court then remanded the case for the parents and school authorities to develop a solution acceptable to both.[44] As one commentator described the decision, "[i]n essence, the Court validated in principle the permissibility of home education, subject to a process of official approval on matters of curriculum, teacher competence, textbook adequacy, and pupil progress."[45]

Given the flexibility of such standards, local public school officials thus still can make it very difficult for parents to exercise their liberty right in education and child rearing should the officials so desire. The scene is set for further confrontation, administrative delay, and generally a spirit of adversity rather than cooperation. Often the disagreement is so severe that the conflict ends up in court.

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40. 399 Mass. 324, 504 N.E.2d 592 (1987).
41. *Id.* at 325, 504 N.E.2d at 594 (quoting MASS. GEN. LAWS ANN. chap. 119, § 24 (West 1987)).
42. *Id.* at 333, 504 N.E.2d at 598 (quoting MASS. GEN. LAWS ANN. chap. 76, § 1 (West 1987)).
43. Care and Protection of Charles, 399 Mass. at 329-33, 504 N.E.2d at 596-98.
44. *Id.* at 337-40, 504 N.E.2d at 600-02.
45. Lupu, *supra* note 34, at 47.

III. THE LEGAL STANDARD

A. Background Supreme Court Decisions

The first Supreme Court decision directly addressing state regulation of private education was *Meyer v. Nebraska*,[46] where the Court struck down a Nebraska statute that made it a criminal offense for a public or private school teacher to teach a language other than English to students below high school level. Two years later the Supreme Court decided the landmark case of *Pierce v. Society of Sisters*.[47] In *Pierce*, state authorities, under the authority of a compulsory education statute, wanted to prohibit parents from sending their children to private school instead of public school. Two private schools were involved—one a Catholic school and the other a military academy. Relying on the due process clause of the fourteenth amendment, the Supreme Court held that a parent has a right to choose private education rather than the public education provided by the state.[48]

Pierce was a victory for parents, but the victory is pyrrhic because the decision also contains the seeds of extensive state regulation of private education. The Court, in dicta, said:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[49]

Although *Pierce* gives parents the right to choose private education, the decision also gives the state considerable power to regulate private education, perhaps to such an extent that the parents' choice may be one of form rather than substance. The *Pierce* parents won the battle, but they arguably lost the war.

In *Farrington v. Tokushige*[50] the Supreme Court further defined the due process limits of state regulation. *Farrington* concerned the teaching of Japanese in private foreign language schools in the territory of Hawaii prior to statehood. The contested state regulation included time limits, content control, English language emphasis requirements, a permit, and a loyalty pledge.[51] The Court struck down these regulations on the ground that the state cannot regulate "the intimate and essential details" of a private school so that the public officers effectively control the school.[52]

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46. 262 U.S. 390 (1923).
47. 268 U.S. 510 (1925).
48. *Id.* at 535.
49. *Id.* at 534.
50. 273 U.S. 284 (1927).
51. *Id.* at 291-97.
52. *Id.* at 298.

B. The Legal Standard Under the Free Exercise Clause

When parents want to educate their children privately because of religious conviction, they will probably frame their claim in first amendment free exercise terms rather than in strictly due process terms. The leading free exercise decision concerning state regulation of education is *Wisconsin v. Yoder.*[53]

In *Yoder* the Supreme Court held that Wisconsin's compulsory education law was an unconstitutional burden on the free exercise rights of the Amish people. In so holding, the *Yoder* Court laid down a three-prong test for evaluating free exercise of religion claims. To sustain the claim, *Yoder* said a court must find that there is a "legitimate religious belief," the exercise of which is denied or burdened by a state requirement, and that there is not a "state interest of sufficient magnitude" to override the religious claim.[54] The *Yoder* Court was not clear whether this standard was one of pure ad hoc balancing or whether the test placed a higher burden on the state. In the recent case of *Hobbie v. Unemployment Appeals Commission of Florida,*[55] however, the Supreme Court cleared the confusion and confirmed that free exercise clause claims are subject to strict scrutiny. The state therefore bears the burden of proof to establish not only that the state concern is compelling, but also that the state action is the least restrictive means of achieving the state interest.[56]

1. The Sincerity of a Religious Belief

Generally the courts do not heavily question the religious sincerity or legitimacy of the claimed religious belief. The courts seem to recognize that religious belief is by nature subjective, and as a result courts are not competent to question the sincerity of the beliefs. As the Supreme Court said in *Thomas v. Review Board*: "The resolution of that question [i.e., what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[57]

2. Determining Whether There Is a Burden

In contrast to the attitude of the courts on the sincerity issue, in analyzing whether there is a burden on the believer's belief, the courts have not respected the believer's subjective feelings but instead have characterized this prong as

53. 406 U.S. 205 (1972).
54. *Id.* at 214.
55. 480 U.S. 136 (1987).
56. *Id.* at 139-44.
57. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

an objective standard.[58] Unfortunately, this characterization fails to recognize that whether state action conflicts with the believer's belief, and thus burdens that belief, depends entirely on the subjective nature of the belief itself. When a court finds in a particular case that the believer's religious belief is sincere but that a burden does not exist, the court has effectively said that the court itself understands the believer's religion better than the believer himself. In addition to being presumptuous, the inquiry necessary to such an approach violates the principle that courts are not to become involved in interpreting the details of church doctrine or a believer's faith.[59]

A related problem is that such an approach also leaves far too much latitude for judges to deny a claim without inquiring into the state's concern. If the court is willing to manipulate the burden prong so as not to find a conflict between the believer's belief and the state action, it is immaterial, at least in theory, whether the state's interests and means are subjected to strict scrutiny because the court need not address whether the state interest is compelling or whether the state action is the least intrusive means available. Even the most unreasonable state interest or means can be upheld. As a result, the extra protection contemplated by the strict scrutiny test is eviscerated. Two recent federal court decisions dealing with education illustrate this problem.

a. Fellowship Baptist Church v. Benton

In *Fellowship Baptist Church v. Benton,*[60] the plaintiffs were two fundamentalist private schools plus their pastors, principals, some of the teachers, some of the parents and the students. The plaintiffs objected to Iowa's requirement that all teachers in private schools be certified by the state.[61] To be certified under the Iowa law, a person had to graduate from an approved school or complete a minimum number of courses in professional education, including courses in human relations to develop "'sensitivity to and understanding of the values, beliefs, life styles and attitudes of individuals and the diverse groups found in a pluralistic society.'"[62]

In analyzing the free exercise claim and then holding that Iowa's teacher certification requirement did not violate the plaintiffs' free exercise rights, the

58. *See* Wisconsin v. Yoder, 406 U.S. at 215-19; *see also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (construction of road by government adjacent to Indian tribal worship places not a burden on Indians' free exercise interests).

59. *See* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-52 (1969) (holding that courts may not resolve civil disputes between church members by interpreting and weighing religious doctrine, but instead must use "neutral principles of law"); Jones v. Wolf, 443 U.S. 595, 602- 06 (1979) (reaffirming *Presbyterian Church* and articulating how "neutral principles" are to be applied); United States v. Ballard, 322 U.S. 78, 86-87 (1944) (a court, in accordance with the first amendment, cannot decide if a believer's religious experiences are true or false).

60. 815 F.2d 485 (8th Cir. 1987).

61. *Id.* at 488-92.

62. *Id.* at 492 (quoting IOWA ADMIN. CODE 670.13.18 (1978)).

Benton court said that "[a]n understanding of plaintiffs' religious beliefs and practices is essential to the proper evaluation of plaintiffs' claims."[63] The court then went on to explain its understanding, saying:

> We recognize the sincerity of plaintiffs' beliefs and the burden which they believe the certification requirement imposes upon them. We agree with the Supreme Court of Iowa, however, that plaintiffs' position is " 'not altogether consistent' " on this matter. Plaintiffs believe that licensure wrongfully interferes with a teacher's calling by God to teach, yet they apparently do not object to the licensure of those in their church called by God to other occupations, such as doctor or lawyer, nor do they object to obtaining a driver's license for those serving in their bus ministry . . . .[64]

At another point, the court noted:

> Plaintiffs believe themselves to be " 'in the world but not of the world,' " but they do not segregate themselves from modern communities. They live in ordinary residential neighborhoods and they interact with their neighbors and others not of their faith. They believe they are called by God to perform certain occupations in life, but these include ordinary occupations such as nurse, lawyer, engineer and accountant, and there is no evidence that they object to the licensing of these occupations.[65]

As the language indicates, the court did not really believe that the state requirement was a true burden on the plaintiffs' beliefs because of the plaintiffs' lack of consistency in other areas.

Unfortunately, such an attitude overlooks one crucial and vital point: these other mentioned areas might not be areas to which the plaintiffs subjectively believe that their religion speaks, while education of their young is an area to which their religion (at least in their perspective) speaks directly. That a believer subjects himself to the state in areas where the state law does not conflict with what he believes to be God's law does not indicate that the burden is any less in the believer's mind for those areas where the believer does perceive a conflict. In the case of Christian parents, many scriptures in the New Testament letters of Paul and Peter indicate that Christians have a general duty to obey civil authorities.[66] If, however, a Christian feels that man's law conflicts with God's law in a particular area, the Bible also supports the proposition that God's law is supreme for the believer in that area. As an example, when the Apostle Peter and others were tried for disobeying the Jewish authorities' instructions not to preach "in the name of Jesus,"[67] they answered that "[w]e ought

63. *Id.* at 489. It is not completely clear from the opinion whether the *Benton* court was focusing exclusively on the burden prong of the *Yoder* test, or whether the court's analysis also applied to evaluating the sincerity of the objector's beliefs. Although the court purported to accept the sincerity of the belief, *see id.* at 493, the court seemed to combine the two prongs at times.

64. *Id.* at 493 (emphasis added; footnotes omitted) (quoting Johnson v. Charles City Community Schools Bd. of Educ., 368 N.W.2d 74, 78 (Iowa 1985)).

65. *Id.* at 489.

66. *See, e.g., Romans* 13:1-7; *Titus* 3:1; I *Peter* 2:13-14.

67. *Acts* 4:18.

to obey God rather than men."[68] Moreover, Christ's instruction to "[r]ender therefore unto Caesar the things which are Caesar's; and unto God the things that are God's"[69] clearly indicates that a Christian should distinguish between different types of state requirements. According to the *Benton* court, however, such distinctions can be used to discredit the validity of the believer's claim against the state action.

b. Mozert v. Hawkins County

Another case in which a court used the objective burden standard to thwart the plaintiffs' free exercise claim is the Sixth Circuit Court of Appeals decision, *Mozert v. Hawkins County.*[70] In *Mozert*, the plaintiffs—fourteen parents and seventeen children—claimed that they had sincere religious beliefs which were contrary to the values taught or inculcated by the reading textbooks used in the public school. The parents therefore wanted their children to be released from the reading classes in order to receive alternative reading instruction. Initially the local school board agreed, but the state board of education subsequently decided against allowing release time.[71] The plaintiffs then sought to hold the defendants liable for "'forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions.'"[72]

At the trial court level, the federal district court found that there was a burden on the plaintiffs' beliefs because their beliefs compelled them to refrain from exposure to the reading textbooks.[73] The district court specifically rejected the idea that in determining whether there was a burden it should decide if the plaintiffs' objections were central to their faith.[74] The court said that there was a burden "despite the fact that many people holding more orthodox religious beliefs might find the plaintiffs' [beliefs] inconsistent, illogical, incomprehensible, and unacceptable."[75]

Because the district court found a burden, it then examined the state's interest and whether the state's means was the least restrictive way of furthering the state's interest. The district court found that the state had a compelling state interest in the literacy of its citizens, but that this interest could be accommodated by the less restrictive means of allowing the students to opt out of the

68. *Acts* 5:29.

69. *Matthew* 22:23.

70. 827 F.2d 1058 (6th Cir. 1987), *cert. denied,* 108 S. Ct. 1029 (1988).

71. *Id.* at 1059-61. For the trial court's statement of facts, see Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194, 1196-97 (E.D. Tenn. 1986). The parents in *Mozert* were not seeking totally separate private education for their children, so the fact situation is not exactly analogous to that of parents who are doing so. Nevertheless, the parents were not seeking to change the public school curriculum for all students, but rather only wanted to control the reading curriculum for their children. Also, for purposes of seeing how courts analyze the burden prong of the *Yoder* test, the case is exactly on point.

72. Mozert v. Hawkins County, 827 F.2d at 1061.

73. Mozert v. Hawkins County Public Schools, 649 F. Supp. at 1198.

74. *Id.*

75. *Id.* at 1198-99.

public school reading program and having the parents teach reading to their children at home.[76] The children's reading proficiency would then be evaluated by standardized achievement tests, and, if deficiencies were noted, the parents and school officials could then "confer to facilitate improvement."[77]

On appeal, however, the circuit court reversed without ever reaching the questions of whether the state interest was compelling or whether the state interest could be accomplished through a less restrictive means.[78] Instead the circuit court held that there was no burden on the plaintiffs' religious beliefs because the state action required only mere exposure.[79] In the court's words:

> Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage or refrain from engaging in a practice contrary to or required by their sincerely held religious beliefs.[80]

To support this position, the court went to great lengths to distinguish Supreme Court decisions such as *Hobbie v. Unemployment Appeals Commission of Florida, Thomas v. Review Board,* and *Sherbert v. Verner*, cases in which the Supreme Court held that the denial of unemployment benefits to persons who refused to work for religious reasons violated the first amendment free exercise clause.[81] Moreover, the court said *Yoder* is distinguishable because of the unique fact situation of the Amish and the impossibility of reconciling the goals of public education with the Amish religion which requires parents to prepare their children for a separate way of life.[82]

Upon examination, however, the court's distinctions do not stand up. In the employment decisions, the potential loss to the plaintiff if he followed his religious belief and declined a job was only money, surely a less significant burden than years of compulsory education and value inculcation during the formative years of a child's life.[83] Moreover, it was exposure that the Supreme Court in *Yoder* said would likely destroy the Amish way of life.[84] There is no indication in *Yoder* that the state compulsory law or the state authorities required the Amish children (in the words of the *Mozert* court) "to affirm or deny a religious belief." "Mere exposure" in and of itself presented a sufficient burden to warrant first amendment protection.

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76. *Id.* at 1202-03.
77. *Id.* at 1203.
78. Mozert v. Hawkins County, 827 F.2d at 1070.
79. *Id.* at 1063-68.
80. *Id.* at 1066.
81. *Id.* at 1065. (The mentioned Supreme Court cases are cited therein.)
82. *Id.* at 1067.
83. *See id.* at 1079 (Boggs, J., concurring).
84. Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972).

These two cases—*Benton* and *Mozert*—point out the inherent difficulty of objectively evaluating whether there is a burden on a believer's asserted religious belief. More significantly, the cases show how an objective burden standard allows courts to eviscerate the protection contemplated by strict scrutiny. By evaluating the burden with an objective standard, courts can effectively say that the believer's distinctions are not the ones that count, and then the court need not reach the question of whether the government's interest is compelling or whether the government action is the least intrusive means of accomplishing the state interest.

3. The State's Compelling Interests

"Education" undoubtedly is an important interest of the state. "Education," however, is an undefined term which means different things to different people. To really understand the state's interest in education, it is necessary to pinpoint exactly what the state is trying to accomplish through education that can be considered a compelling state interest.

The Supreme Court has recognized two interests or concerns which the state has in education: preparing children to be self-reliant and competent citizens,[85] and inculcating in children the values essential to a democratic society.[86]

a. Productive Citizens

The Supreme Court has acknowledged that the state has a legitimate concern in ensuring that children receive enough education so they will be productive, or at least self-reliant, citizens in society.[87] This concern seems reasonable, especially since the state now provides a societal safety net for those persons who cannot provide for themselves. If the state is going to bear the responsibility for those who need help, then surely the state has an interest in ensuring that as few people as possible fall into this category. The relevant question is how far this interest extends.

For the children of parents who do not agree with conventional societal wisdom as to what type of lifestyle their children should be prepared for, the Supreme Court has said that this concern of the state is limited. In *Wisconsin v. Yoder*, the Amish wanted to prepare their children to continue the Amish tradition of agrarian, rural existence, a lifestyle very different from that of the rest of society.[88] Because there was no evidence that the minority (the Amish)

85. *See id.* at 221-22.

86. *See* Bethel School Dist. v. Frazer, 478 U.S. 675, 681-84 (1986); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

87. *See supra* note 84.

88. Wisconsin v. Yoder, 406 U.S. at 221-28.

was wrong and that the majority (the school officials) was right about which type of lifestyle and work the children should be prepared for, the Court rightly would not assume that the state was correct in its assertions.[89]

The Supreme Court decision of *San Antonio Independent School District v. Rodriguez*[90] provides further evidence of how this state interest in education is limited. In *Rodriguez*, the Court held that education was not a fundamental right protected by the equal protection clause of the fourteenth amendment and thus Texas was not required to provide equal funding to all school districts within the state.[91] The poorest school district in Texas at the time spent only $356 per pupil while the wealthiest district spent $594, a difference of 69%.[92] Nevertheless, the Court said: "[The lack] of personal resources has not occasioned an absolute deprivation of the desired benefit [i.e., education]. The argument here is not that the children are receiving no public education; rather, it is that they are receiving a poorer quality education than children in districts having more assessable wealth."[93]

The Court then said at a later point in the opinion:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly protected . . . .
>
> . . . .
>
> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [the right to speak or to vote intelligently and effectively], we have no indication that the present . . . system fails to provide each child with an opportunity to acquire the basic minimal skills [necessary].
>
> . . . .
>
> We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.[94]

Admittedly, *Rodriguez* dealt with whether the state had the affirmative duty to provide equal education as a fundamental right under the equal protection clause rather than whether the state could decide to treat its interest in education as a compelling concern. A negative answer to the former does not necessarily foreclose a positive answer to the latter, at least when it comes to the amount of emphasis the state gives to public education in its budget policy goals. However, "'[o]nly the gravest abuses, endangering paramount interest,'" will justify an interest as compelling.[95] That a state does not have to provide roughly

89. *Id.* at 223-24.
90. 411 U.S. 1 (1973).
91. *Id.* at 29-39.
92. *Id.* at 12-13.
93. *Id.* at 23.
94. *Id.* at 36-37.
95. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

equal levels of educational support to all children certainly weakens any claim by the state that parents do not have the right to provide a different type of basic education for their children. As long as the parents do not completely deprive their children of basic education skills, then the parents are doing as much as the Supreme Court is willing to require of the state itself.[96] Given the limited nature of the state's interest in basic education, it is hard to justify extensive regulation of private education unless some other compelling interest is shown.[97]

b. The Inculcation of Values

According to the Supreme Court, a second concern the state has in education is the inculcation of values necessary for democracy.[98] Unlike the first interest—the development of basic skills to be a self-reliant and competent citizen—the strength of this state interest is not so obvious, especially in the case of children of parents who choose the private education alternative.

At the outset, one has to question exactly which values are necessary for the maintenance of democracy. In a thoughtful article, Kenneth A. Strike of Cornell University says that there are two general views of what constitutes democratic values in the education context: the "conventional" view and the "censor's" view. With the former, the "marketplace of ideas" is the central value. Any inquiry should include alternative viewpoints, criticism, and debate. "No idea is sacrosanct, no theory beyond challenge. Ideas must prove their worth by being tested in the crucible of debate." Autonomy, personal growth, and the freedom of the students take precedence over the values of the community and the parents. Children are assumed to be adult, rational actors, and educators are the protectors of the free intellectual environment necessary for development. Parents who want to structure their child's moral development to conform to their own value system are trying to impose a "narrow vision" which will harm the child's growth and development.[99]

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96. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 36-37.

97. In fact, a major study conducted by James Coleman, Thomas Hoffer, and Sally Kilgore concludes that private schools are better than public schools in providing students basic educational skills, even when selection criteria such as family background factors are controlled. *See* J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982). Although not universally accepted, the study does suggest that private schools further rather than thwart the state's interest in providing sufficient basic skills so that a child will grow up to be a self-reliant and competent citizen. For several critiques of the Coleman, Hoffer, and Kilgore study and responses by the study authors, see 58 SOC. OF EDUC. (1985) and 51 HARV. EDUC. REV. (1981).

The Coleman, Hoffer, Kilgore study was based on standardized achievement test scores. For an evaluation of the study using Scholastic Aptitude Test (SAT) results, see Bickel & Chang, *Public Schools, Private Schools, and the Common School Idea*, 17 URBAN REV. 85-97 (1985) (concluding that there are no appreciable differences between public and private schools).

98. *See supra* note 86.

99. Strike, *A Field Guide of Censors: Toward a Concept of Censorship in Public Schools*, 87 TCHRS. C. REC. 239, 240-42 (1985).

The censor's view that Strike postulates is just as developed as the conventional view, but there the similarity ends. With the "censor's" view, pluralism does not mean the "vigorous discussion between people with opposing views," but rather the "existence of separate autonomous communities whose members are free to pursue their own values and to transmit them to their children without opposition." Different groups and parents have the right to maintain their group and its culture, which may mean isolation from the mainstream of society. The central idea is freedom of conscience, not a marketplace of ideas. Children are immature students, and the curriculum of the schools is a "set of choices about what is educationally worthwhile." Teacher claims of autonomy are really a subterfuge for the real conflict between two groups—the educators and the parents—about what is educationally valuable. "It is the truth that makes men free, not diversity." The real values necessary for democracy are respect for different groups who believe in different forms of the "truth."[100]

As the foregoing discussion illustrates, the meaning of the phrase "values essential for democracy" is not self-defining, and as a result even Supreme Court decisions are inconsistent on the power of school authorities to override first amendment concerns in order to inculcate values.[101] Undoubtedly, either of the opposing views articulated by Strife could be developed and refined by a school board as their articulation of the values essential for democracy, but the type of school system that would result from each respective view would be substantially different. Since it is so difficult to articulate what values are essential, the state's interest in furthering these values is not as compelling as it may have first appeared.

As a further example of the problems associated with the concept of values "essential" to democracy, consider the *Mozert v. Hawkins County* case discussed earlier.[102] In *Mozert* the court said that critical reading, to which the plaintiffs objected on religious grounds, furthered the values of tolerance of divergent political and religious views and the consideration of the sensibilities of others—values which the court, citing Supreme Court decisions,[103] deemed essential to democracy.[104] Though the court declined to reach the question of the state's interest, it nevertheless, in dicta, characterized critical reading as a compelling

100. *Id.* at 242-44; *see also supra* notes 28-30 and accompanying text.

101. *Cf.* Bethel School Dist. v. Frazer, 478 U.S. at 681 ("fundamental values" necessary for democracy, as relating to expressing unpopular and controversial views in schools, must take into account the sensibilities of others, and thus school officials can ban lewd language); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-14 (1969) (school officials cannot ban students from wearing armbands to show opposition to the Vietnam War merely to avoid the controversy that accompanies an unpopular viewpoint, but the student action must threaten to substantially disrupt the work of the school or impinge upon the rights of other students before school officials can take regulatory action).

102. *See supra* part III.B.2.b.

103. The Supreme Court decisions the *Mozert* court cited for this proposition are Sherbert v. Verner, 374 U.S. 398 (1963) and Thomas v. Review Bd., 450 U.S. 707 (1981), neither of which dealt with education.

104. *See* Mozert v. Hawkins County, 827 F.2d at 1068-69.

state interest.[105] In concurrence, however, Judge Boggs aptly pointed out that the state conceded that critical reading was not really definable and could not be evaluated. In Judge Boggs' words: "It seems . . . to be extremely difficult, not to say unfair, to rest a compelling state interest on the asserted failure of plaintiffs to learn something which defendants are apparently unable to define and unwilling to test for."[106]

Contributing to this definition problem is the broad approval authority that local education officials have under vague state statutes; the "essential" values can sometimes be the school superintendent's personal values. In fact, the most successful attack on state approval statutes thus far by parents attempting to teach their children at home is a "void for vagueness" argument, but even when the statute is not found constitutionally vague, the power to approve or disapprove often varies widely from school district to school district.[107]

In sum, the state's interest in inculcating values does not seem as compelling as the Supreme Court or education officials would have one believe. The Court has not specifically identified the values in which the state has a compelling interest beyond the generality of those values which are "essential to democracy." As shown, this phrase is so broad that it is essentially meaningless.

* * * *

So far, the examination of the state's concern in inculcating values has concentrated on whether the state has articulated and defined the values it seeks to inculcate. The unspoken assumption has been that the state legitimately can deem the inculcating of certain values a compelling concern as long as those values are identifiable.

On a more fundamental level, however, this whole premise of the state inculcating values through the school system seems inconsistent with the first amendment. Freedom of speech, freedom of religion, freedom of association, freedom of the press, and the right to petition government all implicate the right to think freely as individuals rather than as people inculcated with values which the state views as important. When government, fortified with compulsory attendance laws, seeks to inculcate values, there is bound to be tension with the first amendment. In the area of religious freedom or freedom of conscience, this is particularly true. Although religion in its broadest sense can be consi-

105. *Id.* at 1070-71.
106. *Id.* at 1077 (Boggs, J., concurring).
107. *See supra* notes 37-45 and accompanying text.

dered a world view,[108] fundamentalist Christian parents seem to be especially sensitive to conflict between the inculcating function of the state and the inculcating function of their particular view of Christianity. Writings of religious philosophers and lawyers have raised this awareness to an even higher level in recent years.[109]

Given this tension, an extreme but logical position can be taken that state inculcation of values through schools is unconstitutional. As the argument goes, public education was not part of American life when the Constitution was written, and as a result the framers had no occasion specifically to address the state's role in this area. A principle that comes through loudly and clearly, however, is that the framers wanted to protect the autonomy of individuals to form opinions, to express themselves, and generally to think in a manner largely unfettered by state control. Applying this principle to the state's value inculcation interest in education, one could (should?) conclude that our modern public education system, as presently structured, is unconstitutional because value inculcation is not a proper role for the state under the first amendment.[110]

Using just such a method, one commentator, Stephen Arons, has argued that there is a "core principle or central meaning" to the first amendment

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108. As one commentator, M. Scott Peck, M.D., observes in his best-selling book, THE ROAD LESS TRAVELED:

> As human beings grow in discipline and love and life experience, their understanding of the world and their place in it naturally grows apace. Conversely, as people fail to grow in discipline, love, and life experience, so does their understanding fail to grow. Consequently, among the members of the human race there exists an extraordinary variability in the breadth and sophistication of our understanding of what life is all about.
>
> This understanding is our religion. *Since everyone has some understanding—some world view, no matter how limited or primitive or inaccurate—everyone has a religion. This fact, not widely recognized, is of the utmost importance: everyone has a religion.* We suffer, I believe, from a tendency to define religion too narrowly . . . .

M. PECK, THE ROAD LESS TRAVELED 186 (1978) (emphasis added). *See generally id.* at 186-232.

109. *See, e.g.*, F. SCHAEFFER, A CHRISTIAN MANIFESTO (1982); F. SCHAEFFER, THE GREAT EVANGELICAL DISASTER (1984); J. WHITEHEAD, THE STEALING OF AMERICA (1983).

110. A strong advocate of such a functional approach to constitutional construction is Justice Brennan, who articulated the position well in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), a case concerning the public school setting. *Schempp* held that the first amendment establishment clause prohibited Bible readings or organized prayer in the public school classroom. In his concurring opinion, Justice Brennan wrote:

> Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, *our use of history of their time must limit itself to broad purposes, not specific practices.* By such standard, I am persuaded, as the Court, that the devotional exercises . . . offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment.

Id. at 241 (Brennan, J., concurring) (emphasis added).

Moreover, the Supreme Court has used such a method of construction to develop what are now considered mainstays of constitutional jurisprudence. In Griswold v. Connecticut, 381 U.S. 479 (1965), for example, the Court, using similar logic, recognized the right of privacy for married people and thus struck down a state restriction on the use of contraceptives. In Justice Douglas' words:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice—whether public or private or parochial—is

that,[111] when applied to public schools, mandates a major restructuring to include revised thinking on financing,[112] equal protection,[113] and regulation of private schools.[114]

Arons concentrates on the first amendment free speech clause, but there is just as much logical support under the free exercise clause of the first amendment. Both the free exercise clause and the establishment clause emanated from a system where the state church established orthodoxy. As another commentator has pointed out, the clauses thus should be construed together as "functionally interdependent" with the free exercise clause protecting the individual's religious identity and the establishment clause ensuring that the social institutions of the state do not infringe upon this identity.[115] More generally, the central value of the clauses is to protect the right to develop and nurture nonmajoritarian religious belief.[116]

Today there is no organized state church in the same formal sense as there was in early America. This is not to say, however, that the same evil the framers saw in the state church cannot manifest itself through some other state institution. The public school system, with its value-inculcating role, backed up with compulsory education laws that (as applied) allow for extensive regulation of private education is such an institution. In essence, "[t]he school has become the established church of secular times."[117]

* * * *

To call public schools the church of the modern state is a strong statement, but the similarities between the function of the church in early America and

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also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights . . . . The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.

Id. at 482-83.

111. Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76, 91-92 (1976).

112. Arons, *supra* note 111, at 100.

113. *Id.* at 101.

114. *Id.* at 103.

115. *See* Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1638-39 (1987). Admittedly, there is not unanimity on this point. Historical evidence also suggests that the religion clauses had two separate purposes. According to this evidence, the free exercise clause protected individual freedom of conscience from federal interference, while the establishment clause protected states' rights to maintain state churches. In other words, free exercise was to be an individual's right *vis a vis* the federal government, while non-establishment was to be a states' right, or federalism issue. *See* DREISBACH, REAL THREAT OR MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 89-96 (1987). With the passage of the fourteenth amendment and the development of the incorporation doctrine, however, the utility of such an approach today is questionable at best.

116. *See id.*; New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 293, 313 (D. Mass. 1987).

117. Arons, *supra* note 111, at 104 (quoting Illich, *Commencement at the University of Puerto Rico*, NEW YORK REV. OF BOOKS, Oct. 9, 1969, at 12).

the value-inculcating function of modern public education is also very strong. In the Massachusetts Bay Colony, for instance, church membership, and thus belief, was not required, but church attendance was mandatory. The justification was based on a distinction between the external and internal. The civil magistrate, in accordance with the law of the land, could compel Sunday worship (i.e., remember the Sabbath and keep it holy); but no one could actually be forced to internalize the faith.[118] Likewise, the whole population, whether believers or not, paid taxes to support the parish and the minister.[119]

The justification used for the attendance requirement is expressed well in a letter written by John Cotton defending the New England system:

> You think to compel men in matter of worship to make men sin . . . . If the worship be lawful in itself, the magistrate compelling him to come to it compelleth him not to sin, but the sin is in his will that needs to be compelled to a Christian duty.
>
> . . . But (say you) it doth but make even hypocrites, to compel men to conform the outward man for fear of punishment. If it did so, yet better to be hypocrites than prophane [*sic*] persons. Hypocrites give God part of his due[,] the outward man, but the prophane [*sic*] person giveth God neither outward nor inward man.[120]

Cotton's language is very similar to that of the *Mozert* decision discussed in Part III.B.2.b. In *Mozert*, the court held that the school district did not have to release students from reading classes that the parents objected to on religious grounds because mere exposure did not constitute a burden on religion. To justify its position, the court said:

> If the Hawkins County schools had required the plaintiff students either to believe or say they believe that "all religions are merely different roads to God," this would be a different case. No instrument of government can, consistent with the Free Exercise Clause, require such a belief or affirmation. However, there was absolutely no showing that the defendant school board sought to do this; . . . .
>
> . . . Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer . . . . It was a goal of the school system to encourage this exercise, but nowhere was it shown that it was required . . . . The only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure

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118. *See Liberties of Massachusetts* (1641), in A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY (T. Hutchinson ed. 1769); *The Cambridge Platform* Chapter XVII (1648), in W. WALKER, THE CREEDS AND PLATFORMS OF CONGREGATIONALISM 194, 227-29 (1893).

119. *See An Act for the Settlement and Support of Ministers and Schoolmasters*, chs. 26, 28, 46 (1692), in I ACTS AND RESOLVES OF THE PROVIDENCE OF MASSACHUSETTS BAY (BOSTON 1869); *see also Massachusetts Constitution of 1780, art. III (available in* MASS. GEN. LAWS ANN., Constitution, app. to § 4 (1979)).

120. Copy of John Cotton's answer to a Letter of Sir Richard Saltonstall, in A COLLECTION OF ORIGINAL PAPERS RELATIVE TO HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 404-05 (T. Hutchinson ed. 1769).

> to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief . . . .[121]

Just as Cotton did not consider exposure to ideas alone to be a burden on a person's freedom of conscience, neither did the *Mozert* court. The difference, of course, is that the first amendment did not exist at the time of Cotton's letter.

The practice of requiring persons to pay taxes in support of the church is another example that shows the similarities between the early American church and the modern school situation. The similarity is illustrated well in the early Massachusetts case of *Barnes v. The Inhabitants of the First Parish of Falmouth.*[122] In *Barnes* the plaintiff was a religious teacher, but his followers were not of the Massachusetts orthodox church or of an incorporated religious society. Under the Massachusetts constitution at the time, public teachers of "piety, religion and morality" could receive payment from the state.[123] The court, however, held that this applied only to teachers of incorporated (i.e., state approved) religious societies and thus the plaintiff was not entitled to the public money that the people of his sect paid to the government to support religion.[124]

As justification for its holding, the court went to great lengths to describe why Christianity provided a value system important to society. According to the court, Christianity tends "to make every man . . . a better husband, parent, child, neighbor, citizen, and magistrate."[125] Moreover, Christian values supplement the criminal law and thus are vital to society because "[h]uman laws cannot oblige to the performance of the duties of imperfect obligation . . . . These are moral duties, flowing from the disposition of the heart, and not subject to the control of human legislation."[126] Using this justification, the court reasoned that the state was justified in supporting orthodox Christianity and closely regulating the support of alternative forms of religion because the values the church inculcated were essential to society.

Certainly such a decision in relation to a state church could not be upheld today since the fourteenth amendment makes the first amendment applicable to the states.[127] The question remains, however, as to what evil the first amendment is directed in order to preclude the *Barnes* outcome today. Is it only the technical fact that the state was sponsoring a state church, or is it also the more fundamental evil of the state inculcating values? If the latter, it is but a small step to reach the conclusion that state inculcation of values through schools also violates the first amendment. At a minimum, it is clear that the state's interest in inculcating values should be limited to public schools in order to ensure that

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121. Mozert v. Hawkins County, 827 F.2d at 1069.
122. 6 Mass. 401 (1810).
123. *Id.* at 404.
124. *Id.* at 412-17.
125. *Id.* at 406.
126. *Id.* at 405.
127. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

parents who disagree with the values of the public schools have an escape to private education that is one of substance and not one of form only. Moreover, this escape needs to be relatively unfettered by state officials. Therefore, a revised standard for evaluating free exercise challenges to regulation of private education is needed.

IV. A REVISED FREE EXERCISE STANDARD AND A SUGGESTED MEANS

As detailed in Part III, the free exercise standard of *Yoder* and *Hobbie* does not provide sufficient freedom from state regulation for parents who want to educate their children in a private education program. The objective burden standard can be used to evade the protection contemplated by strict scrutiny, and the "values essential to democracy" that the state seeks to inculcate through education is ill-defined. Even if the values could be defined, however, extending this interest to private education is contrary to the principle of protecting nonmajoritarian beliefs which underlies the first amendment. Therefore, it is vital that parents have a more effective escape for their children from the value inculcation of the public schools than currently exists.

Because of these problems, a revised free exercise test is needed, and this article suggests that the revised test be based on the principles articulated in other areas of the first amendment such as the free speech clause. One commentator has noted that the free exercise clause jurisprudence is awash with confusion because of a lack of substantive content.[128] In the area of free speech, however, the Supreme Court has provided guidance by establishing presumptions which clearly delineate the favored party, depending on the parties involved and the nature of the disputed activity. Free speech conflicts are still difficult, but such legal principles as the "clear and present danger" standard[129] and the restrictions on prior restraints[130] protect nonmajoritarian opinion to a far greater measure than the compromise of *Pierce*, the balancing of *Yoder*, or the strict scrutiny of *Hobbie*. The same measure of protection is now needed under the free exercise clause in private education claims because, as previously discussed, there is a close nexus between education and belief formation which in turn gives rise to a close relationship between the free exercise clause and the free speech clause.

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128. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 847-49 (1984).

129. *See infra* notes 132-33, 138 and accompanying text.

130. *See infra* note 145 and accompanying text.

A. The Relationship Between the Free Speech Clause and the Free Exercise Clause

The free speech clause of the first amendment and the free exercise clause are related in many ways. As previously mentioned in Part III, the free exercise clause is directed at the right of individuals to develop and nurture nonmajoritarian beliefs,[131] and the same is true for the free speech clause. If the only speech or belief protected by the free speech clause or the free exercise clause was that which conformed with the majority, there would not be any need for the clauses.

To have true freedom of speech, there must be freedom of thought, or at least the freedom to develop thought freely if one chooses. The right to speak is largely meaningless if the state restricts the beliefs, or values, upon which speech is based to those values that the state considers proper. Values do not develop in a vacuum but instead stem from some philosophical source, be it theistic revelation or humanistic reasoning. Because of this close link between speech, values, and philosophy, suppression of one also affects the other two. Suppression of speech that inhibits advocacy and discourse on a particular set of values also indirectly inhibits the philosophy underlying the given values.

With speech predicated on humanistic philosophies, the free speech clause itself provides protection, even when the speech involves radical advocacy of illegal action. Unless the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," the speech is protected.[132] More succinctly, the speech must present a "clear and present danger" to a legitimate state interest.[133] When the underlying philosophy is clearly "religion," one would think that at least the same (and possibly even extra protection) would be provided because of the joint protection of the free speech clause and the free exercise clause. As previously explained, such has not been the normal case in the education setting when the analysis focuses solely upon the free exercise clause and its current jurisprudence.

Occasionally however, the Supreme Court has recognized the link between the two clauses and has thus conducted a broader analysis than that of the current free exercise test. In *West Virginia State Board of Education v. Barnette*,[134] for example, a group of Jehovah's Witnesses objected to a Board of Education resolution requiring all teachers and students to salute the flag as a regular part of the public school activities. Failure to participate would "'be regarded as an Act of insubordination,'" for which the child could be expelled, be classified as "'unlawfully absent,'" and "be proceeded against as a delinquent." Parents of the child could be criminally prosecuted.[135] The Jehovah's

131. *See supra* notes 110-17 and accompanying text.
132. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
133. Dennis v. United States, 341 U.S. 494, 505 (1951).
134. 319 U.S. 624 (1943).
135. *Id.* at 626.

Witnesses objected to the resolution based on a literal interpretation of *Exodus* 20:4-5, which says: " 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them.' "[136]

The Jehovah's Witnesses' objection was religiously based (as the Court acknowledged),[137] and therefore the Court could have focused exclusively on the free exercise clause of the first amendment. Instead, the Court took a broader perspective, saying:

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a *clear and present danger* of action of a kind the State is empowered to prevent and punish . . . . But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a *clear and present danger* that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[138]

Such is also the message of the more recent Supreme Court decision, *Wooley v. Maynard*,[139] in which the Court struck down a New Hampshire statute requiring residents to display car license plates embossed with the expression "Live Free or Die," the state motto of New Hampshire.[140] Again, the objectors were Jehovah's Witnesses, and the philosophy underlying their objection was their religious belief. In the words of the plaintiff objector:

> "By religious training and belief, I believe my 'government'—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions."[141]

Under the current free exercise test, the Court easily could have ruled that displaying a sign did not require a person to give up his life for the state and thus there is no conflict or burden on the person's belief. Instead, the Court again used free speech principles to invalidate the statute.[142]

Yet another case where the Supreme Court chose to use a free speech analysis rather than a free exercise analysis is *Widmar v. Vincent*.[143] In *Widmar*,

136. *Id.* at 629.
137. *Id.*
138. *Id.* at 633-34 (emphasis added).
139. 430 U.S. 705 (1977).
140. *Id.* at 707.
141. *Id.* at 707 n.2.
142. *Id.* at 717.
143. 454 U.S. 263 (1981).

a registered student religious group objected to a university regulation that prohibited the use of university buildings or grounds "'for purposes of religious worship or religious teachings.'"[144] The Court did not undertake to judge whether the students' belief was sincere or whether there was a burden on the belief. Instead, the Court used a straightforward free speech test, saying "[o]ur cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content . . . . In this constitutional context, we are unable to recognize the State's interest as sufficiently compelling to justify content-based discrimination against respondent's religious speech."[145]

The clear import of these decisions is that the values protected by the free exercise clause and the free speech clause are closely related. Therefore, the legal standard used for the two should also be closely related.

B. The Contours of a Consistent Free Exercise Test for Religious-Based Objections to State Regulation of Private Education

1. Sincerity of Belief and Burdens on Belief

For the reasons explained in Part III. B.1. and 2., a court, when analyzing a free exercise claim of parents who desire private education for their children for religious reasons, should presume the sincerity of the believer's belief and the validity of the burden which the believer claims the state action imposed upon the belief. This presumption will serve to stop courts from purporting to understand a person's religion better than the person himself, and, more importantly, the presumption will require the courts to scrutinize the concerns of the state in all cases.

2. The Concerns of the State

Another major premise of the free speech decisions is that the danger the state alleges must not be abstract doctrine but rather must be a truly identifiable, tangible threat.[146] Likewise, any concern the state has in regulating private education should be tangible and definable before the state can use an interest to override parental choice.

As previously explained, the phrase "values essential to democracy" has

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144. *Id.* at 265.

145. *Id.* at 276.

146. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1968) (to be unlawful, advocacy of illegal action must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Noto v. United States, 367 U.S. 290, 297-98 (1960) (to be illegal, advocacy of illegal action must be reasonably calculated to incite such action rather than advocacy of mere doctrine); Yates v. United States, 354 U.S. 298, 316, 321-22 (1956) (criminal prosecution for advocacy of abstract doctrine not constitutional under the free speech clause).

not been defined; and even if the phrase were definable, compulsory inculcation of such values in private education runs contrary to the spirit and purpose of the first amendment.[147] Thus, the state's concern in regulating private education definitely should not include this function.

The other concern of the state which the Supreme Court has recognized (i.e., ensuring children receive minimal basic skills to be self-reliant and competent citizens) is legitimate if narrowly defined.[148] For the concern to be compelling enough to extend to private education, however, it must be defined and limited so that it does not develop into value inculcation. Moreover, it would be unfair to hold the parent to a higher standard than the courts are willing to hold the state.

There is another principle from the Supreme Court's free speech decisions that provides guidance on the limits of the state's concern in ensuring children receive basic educational skills. Under free speech jurisprudence, the state can impose restraints before the fact only in the most limited circumstances. With the press, for example, the possibilities of abuse are so great when restraints prior to the fact are imposed that they are very rarely justified.[149] A similar policy of restraint is also necessary in the case of parents who want to educate their children in a private system of education. Any action by the state should be taken after the fact to the extent possible.

Applying this latter principle to regulation of private education, it must be remembered that education of a child is a long-term enterprise, extending over thirteen years from kindergarten through high school graduation. To use a completely after-the-fact approach that measures the skills necessary to be self-reliant, competent citizens at high school graduation would be too late to correct any deficiencies that arise. However, state action that attempts to further the state interest prior to the inception of private education programs presents the same potential abuses that exist under the current legal structure. Therefore, some intermediate monitoring process must be devised that looks at the children's progress on a regular basis but yet is not overly intrusive on the parental rights to structure their child's education.

3. Possible Means of State Regulation

One possible means that complies with the spirit of the above-mentioned principles is standardized testing on an annual basis. The federal district court of Massachusetts, after detailed inquiry into the efficacy of available tests, recently held that such testing met the state's interest in ensuring that basic skills

147. *See supra* notes 98-107 and accompanying text.

148. *See supra* notes 87-97 and accompanying text.

149. *See* New York Times v. United States, 403 U.S. 713 (1971) (The Pentagon Papers); Near v. Minnesota, 283 U.S. 697, 715 (1931).

were taught and at the same time protected the parents' free exercise right to be free from intrusive intervention by the state in the practice of their faith.[150] Because the tests can be given on an annual basis, neither the child's welfare nor the state's interests are irrevocably impaired.

If the tests do indicate a problem, then more intrusive follow-up measures by the state *might* be warranted. Before the state intervenes in the private education system, however, the deficiency must be connected within a problem in the teaching system rather than some other factor such as a child's intellectual ability. Moreover, identification of a problem still does not mean that the state should take control of the child's education. Many other alternatives such as private tutorials and computer-based teaching techniques are also available. Just as a public school should be given a chance to correct identified problems, so should a private education program.

Testing alone may not be an acceptable means of measurement for all children. Some children, although their learning level is actually adequate, may not do well on standardized tests. This is especially true when the test has not been validated properly by race or ethnic background. For these children, different approaches will be necessary. Full inquiry into this area is beyond the scope of this article, but suffice it to say that where there is a will, there is usually a way. Development of alternative, unintrusive measurements for unusual children *is not* beyond the scope of interested parents and educators.

C. Possible Objections

One possible objection to a measurement means such as testing is that it would place too much of an administrative burden on the state, especially if a child does poorly on an evaluation and the public school officials must follow up with more individualized methods. This objection is not persuasive, however, when one considers that the state is not the only responsible party available to supply education services. The tests and follow-up could be administered by the parent or by an independent third party. In fact, many parents prefer third parties because they want to be as independent from the public school system as possible.[151] Regardless if the measure is standardized testing or a more particularized process such as oral interviews, public education officials need not be the supplier of the necessary financial or professional resources. As long as there is reasonable assurance that the measurement is a reasonably accurate measurement of the child's education level and that the test is conducted fairly, the state education authorities should be satisfied.

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150. New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 293, 306-08, 319-22 (D. Mass. 1987).

151. Interview with Paul Dillon, Attorney at Law, in Dillon's office in Falmouth, MA (Jan. 29, 1988). Mr. Dillon has handled several legal cases for parents who want to home school their children.

Moreover, there is really no reason to assume there would be a greater administrative burden than the state currently bears even if the state conducted the testing itself. Because the state approval process is currently much more ad hoc in nature and considers the methods of private education programs, the evaluation process is by nature much less objective than is a method that evaluates the output of an education program. To determine if a parent or a third party is a competent teacher, as is required in Massachusetts, for example, might take considerable expertise, time, and effort. Testing, however, looks only to measurable results and thus is a much more distinct standard. The number of disagreements and the accompanying resources needed to resolve the disagreements should decrease, thus freeing up these resources for other purposes. If administrative costs are to be considered, it is only fair to consider the administrative efficiencies that may also accrue. An *a priori* assumption that the overall administrative burden will increase with testing does not seem warranted.

Even if testing would place a greater administrative burden on state officials, however, this burden still would not justify the denial of parental rights. Compulsory education and the furtherance of the state's concern of self-reliant citizens are goals which the state has chosen to undertake. This choice by the state, though, does not weaken the first amendment rights of parents. If administrative effort is necessary to satisfy the state's concern but yet not infringe on religious liberty, then so be it. The effort is worth it.

Another possible objection to the revised standard is that there is no effective check on extremist parents. An example might be Ku Klux Klan parents who teach white supremacy as a tenet of their religious beliefs. These situations probably will occur, but it is also true that they will probably be relatively rare, and the unique situation should not be the cause for denying the choice of other parents. Just as the failure of some public schools to meet the needs of children is not grounds to invalidate the concept of public education in general, neither should the unique parent be cause to deny choice to all other parents.[152] Moreover, the state is not totally powerless in these type situations because the state can legitimately ensure that the child receives the basic skills to be a self-reliant and competent citizen and such skills will help provide the foundation upon which a child can develop his own world view as he or she matures.

It is also important to recognize that there are many other constraints on parental choice. Parents are aware that their children must receive a credible education according to the standards of mainstream colleges and universities if the children are to receive post-secondary higher education in such an institution. For students who go right into the work force after leaving school, employers will insist that the potential employee have the educational skills necessary

152. *Cf.* Parham v. J.R., 442 U.S. 584, 603 (1979) (saying that the statist notion that the neglect of some parents justifies state intervention in all cases is "repugnant to American tradition").

to perform the given job. To assume that most parents will completely ignore such realities in structuring their child's education is not warranted.

Finally, it is a truism that freedom does not come without a price, and sometimes the price is less expediency and the toleration of doctrine and actions which are totally foreign and alien to everything "American." In other areas of first amendment concern, the Supreme Court has said that freedom is worth this price. Such is also the case with state regulation of private education.

V. CONCLUSION

The current legal strife between state educators and parents, who because of religious conviction want to educate their children in a system different from that provided by the state, is really a struggle for control over influence of the children's minds. The state does have a limited interest in ensuring that children receive the basic skills to be self-reliant, competent citizens; but the vast majority of the educational responsibility must be vested in the parents, at least to the extent that parents are willing to accept the responsibility. This vesting is necessary in order to preserve both parental religious liberty and free speech rights under the first amendment. Any further state interest such as value inculcation does not extend to the children of parents who opt to educate their children privately.

Unfortunately, the test the courts currently use under the free exercise clause has not provided sufficient protection to parents and children who want to be different. Parental free exercise rights to educate their children as they see fit are not protected nearly to the same degree as is speech under the free speech clause, even though the values implicated are very similar.

A consistent free exercise clause standard which conforms to the greatest extent possible with the principles underlying the free speech court decisions is needed. The validity of the sincerity of a person's belief and the authenticity of the perceived burden on that belief should be presumed. The state concern should be carefully analyzed and must not be abstract in nature. The only state concern articulated thus far that meets these criteria is ensuring that children receive the basic minimal skills to be self-reliant and competent citizens.

Last, there should be a presumption that private education programs do further the state's interest unless the state can show a tangible deficiency. Therefore, any state action taken to further its legitimate concern must be taken after the fact to the extent possible. To prevent irreparable impairment to the state's interest in education, the state cannot wait until a child completely finishes school before acting. The state can delay, however, until the completion of each school year.

A measure which conforms to these guidelines but yet still protects parental liberty is annual evaluation through standardized testing or some other means such as oral question-and-answer periods. Since resources to accomplish these

evaluations need not come necessarily from the state, the process will not be an excessive burden on the state education system. Moreover, resources may actually be freed up because the monitoring system will look only at the results of education rather than the means of education. Although testing may not be sufficient in all situations, development of alternative, unintrusive measurements is an achievable task if educators and parents commit themselves.

Finally, it must be remembered that the issue of parental rights to structure their children's education concerns values that go far beyond administrative costs and methods of evaluation. The most compelling justification for a revised standard for free exercise claims against state regulation of private education is the extra liberty and protection that the proposed revision provides.