State Regulation of Private Religious Schools and the State's Interest in Education

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From the time of the Massachusetts Bay Colony[1] with its emphasis on social and religious orthodoxy,[2] to modern America with its emphasis on individual freedoms, the state's interest in education has been recognized.[3] In furtherance of that interest, most states[4] have enacted compulsory attendance[5] statutes which require parents to send their children to some kind of school.[6] Under these statutes, parents may be subject to criminal sanctions for noncompliance.[7]

The statutes provide alternatives from which parents may choose.[8] Attendance at public school invariably complies with the compulsory attendance requirement.[9] All states also permit attendance at certain private schools.[10] Many states, however, require that private schools be approved by the state.[11] In those states, if parents permit their children to attend an

1. The first American compulsory education law was enacted in the Massachusetts Bay Colony in 1642. The text of the statute is set out in E. DEXTER, HISTORY OF EDUCATION IN THE UNITED STATES 584-85 (1904).

2. O.P. CHITWOOD, A HISTORY OF COLONIAL AMERICA 554 (2d ed. 1948).

3. "Today education is perhaps the most important function of state and local governments. Compulsory attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). This quote from *Brown*, of course, arose in the context of the state's interest in its public schools. Arguably, the state's interest in control and regulation of its own institutions is much stronger than its interest in education generally. "*[P]ublic* education is one of our most cherished democratic institutions." Minersville School Dist. v. Gobbits, 310 U.S. 586, 599 (1940) (emphasis added).

4. Every state except Mississippi currently has a compulsory attendance statute. L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 71 (1980).

5. The term "compulsory attendance" rather than "compulsory education" is used because the majority of the state statutes do not require education or instruction, but rather require only that the child be present in school. *Id.* See E. DEXTER, *supra* note 1 for a "compulsory education" statute.

6. For a relatively current list of the state statutes and their provisions, see L. KOTIN & W. AIKMAN, *supra* note 4, at 345-51 app. B.

7. *See id.* at 362-67 app. D ("failure to cause to attend"), 334-43 app. A ("responsibility for compliance").

8. *See id.* at 345-51 app. B.

9. *See id.*

10. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1942) (discussed *infra* notes 62-75 and accompanying text).

11. *See, e.g.*, MASS. ANN. LAWS ch. 76, § 1 (Michie/Law. Co-op. 1978) (approved by the school committee); N.D. CENT. CODE § 15-34.1-03 (1981) (approved by the county superintendent of schools and the superintendent of public instruction); PA. STAT. ANN. tit. 24, § 13-1327 (Purdon

unapproved school, the parents may be in violation of the compulsory attendance statutes.[12]

Some private religious schools refuse to seek state approval, alleging that such approval with its concomitant regulation infringes on the first amendment right of parents to the free exercise of religion.[13] To resolve this conflict between state approval requirements and the right to the free exercise of religion, courts have applied a three-part test.[14] First, there must be a showing that the individual beliefs are sincere and rooted in religion.[15] Second, the court must determine whether the approval requirement actually interferes with a religious belief.[16] If the court finds such interference, the third part of the test involves a determination of whether the state's interest in the regulation is of sufficient importance to override the parents' interest,[17] and if the state's interest can be protected by means which are less burdensome to the free exercise of religion.[18]

The purpose of this Note is to analyze the effect of this three-part test in the context of a claim that state regulation of private religious schools infringes on the right of parents to the free exercise of religion. The state's interest in education will be examined first. Then the role of parents and the private schools in securing that interest will be examined. Next, the

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Supp. 1982-83) (a day school in which subjects and activities prescribed by the standards of the State Board of Education are taught in the English language); S.C. CODE ANN. § 59-65-10 (Law. Co-op. 1982) (school which is approved by the State Board or is member of the South Carolina Independent School Association or some similar organization).

12. *See infra* notes 25, 33, 87, 131, 151, 182 & 197 and accompanying text.

13. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

Beginning with Meyer v. Nebraska, 262 U.S. 390 (1923) (discussed *infra* notes 54-61 and accompanying text), and Pierce v. Society of Sisters, 268 U.S. 510 (1924) (discussed *infra* notes 62-75 and accompanying text), courts have addressed the rights of parents even when the parents were not parties in the litigation. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 107-08 (1978). *See also* Brown v. Dade Christian Schools, 556 F.2d 310, 315 (5th Cir. 1977) (Goldberg, J., concurring).

14. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). In its first opinion on a religiously-based demand for an exemption from the requirements of a state law, the United States Supreme Court declared that only religious beliefs, not actions motivated by those beliefs, were constitutionally protected. Reynolds v. United States, 98 U.S. 145, 164 (1878) (upholding conviction for polygamy). In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court abandoned the belief-action test and hinted at a balancing of the interests of the state against the interest in free exercise of religion. The Court said, "We must determine whether the alleged protection of the State's interest . . . has . . . come into conflict with the overriding interest protected by the federal compact." *Id.* at 307. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court announced a two-tiered test where a sufficient degree of religious interest triggered a burden on the state to demonstrate a compelling state interest. *Id.* at 403. The free exercise clause was first applied to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

15. The threshold question of sincerity involves a determination of whether the belief is "truly held." United States v. Seeger, 380 U.S. 163, 185 (1965). Only religious beliefs are protected. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious beliefs." *Yoder*, 406 U.S. at 215.

16. *Yoder*, 406 U.S. at 214.

17. *Id.* "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

18. Cantwell v. Connecticut, 310 U.S. 296, 306-07, 311 (1940). *See generally* L. TRIBE, *supra* note 13, § 14-10, at 846-59.

Wisconsin v. Yoder[19] free exercise balancing test will be discussed. State court opinions that have applied that test in the context of regulation of private religious schools will then be analyzed. This Note will then examine standardized achievement testing as an alternative to direct regulation of private religious schools. Finally, this Note will conclude that the issue of state regulation of private religious schools will not be resolved without reexamination of the goals of education, and the roles of the state and individual parents in setting and meeting those goals.

Defining the State's Interest

To determine if the state's interest in education is important enough to outweigh an individual interest in the free exercise of religion, the interest of the state first must be defined.[20] The state might assert two different interests in education. The first is that education is essential to preserve a democratic society.[21] A second interest is that of the state in its role as *parens patriae* to secure an individual child's welfare.[22] Articulation of these state interests first occurred in the late nineteenth century, when enforcement of compulsory attendance statutes resulted in legal challenges.[23]

The earliest case which defined the state's interest did not differentiate between the two possible interests. In *Commonwealth v. Roberts*,[24] a parent was convicted of violating the Massachusetts Compulsory Education Act of 1890[25] because his child was attending a nonapproved private school.[26] On appeal, the court interpreted the statute as requiring that all children be educated, rather than requiring that they be educated in any particular way.[27] Taking the object of the statute into account, the court held that if a child did not attend an approved school, the parent must show that the child was being properly instructed at whatever school the child attended.[28] The court's characterization of the state's interest as providing for "education," makes it unclear whether the court saw that interest as the protection of the state itself or of the children. The statute permitted parents to "otherwise instruct" their children, but further required that children acquire "the branches of learning required by law to be taught in the public schools."[29] Since those "branches of learning" included only those subjects[30] that are commonly considered to be

19. 406 U.S. 205 (1972).

20. *See supra* note 17 and accompanying text.

21. *See* Shapiro v. Doren, 199 Misc. 643, 648, 99 N.Y.S.2d 830, 834-35 (Dom. Rel. Ct. 1950) (the case is reported in 199 Misc. 643 as *People v. Donner*).

22. *Id.* at 652, 99 N.Y.S.2d at 839.

23. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling* in HISTORY, EDUCATION AND PUBLIC POLICY 62 (D. Warren ed. 1978).

24. 159 Mass. 372, 34 N.E. 402 (1893).

25. 1890 Mass. Acts ch. 384. The Act required parents to send their children to public school or an approved private school, or to cause the child to be otherwise instructed in the curriculum required in the public schools. *Id.* Note that the statute did not require prior approval of this "other instruction."

26. 159 Mass. at 373, 34 N.E. at 402.

27. *Id.* at 374, 34 N.E. at 403.

28. *Id.* The burden was to be the same if the parent taught the child at home. *Id.*

29. *See supra* note 25.

30. The required subjects were orthography, reading, writing, English grammar, geography,

"basics,"[31] it may be inferred that the court viewed the state's interest as ensuring only that its citizens be educated to participate in a democratic society.

A second early case which defined the state's interest in education was *State v. Bailey*.[32] *Bailey* involved a constitutional challenge to the Indiana compulsory attendance statute.[33] There the court addressed the issue of whether the statute invaded the natural right of parents to govern and control their children.[34] Summarily rejecting the natural parental rights argument,[35] the court declared that the state's interest was to secure the child's opportunity to acquire an education in order to protect both the welfare of the child and the interest of society.[36] The definition of the state's interest by the *Bailey* court is thus twofold: in protecting the "welfare of the child," the state asserts its *parens patriae* interest,[37] and in protecting "the interest of society," the state is protecting its own interest.[38] Further discussion of these interests was probably unnecessary, because it appears that Bailey was not educating his child at all, and therefore neither interest was being protected.

In both of these early cases, the interest of the state and the concern of the court was that children receive some education, although the specific interests of the state in requiring education were not clearly articulated. The cases clearly held, however, that the state did have some interest, and could require children to be educated in some manner.

The next major issues examined by the courts were the role of private

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arithmetic, drawing, United States history, and good behavior. In addition, local school committees could require algebra, vocal music, agriculture, sewing, physiology, hygiene, the use of tools, and cooking. 1894 Mass. Acts. ch. 320. The subjects required by the 1894 act were also required in 1893, the date of the *Roberts* decision. *Cf. id.* § 1.

31. *See infra* note 258 and accompanying text.

32. 157 Ind. 324, 61 N.E. 730 (1901).

33. The parent was charged with refusing to send his child to school in violation of the statute. He defended by asserting its unconstitutionality. *Id.* at 325-26, 61 N.E. at 730.

34. *Id.* at 329, 61 N.E. at 731-32. The natural rights issue does not appear to be the main issue in the constitutional challenge. *See id.* at 325-29, 61 N.E. at 730-31.

35. *Id.* at 329-30, 61 N.E. at 731-32.

36. *Id.* at 329-30, 61 N.E. at 732. The court stated that parents owe a duty both to the child and to the state to educate their children. *Id.* at 329, 61 N.E. at 732. This duty was again articulated, this time by the United States Supreme Court, in Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (discussed *infra* notes 54-61 and accompanying text). The *Bailey* court also mentioned the "vast fund" that had been set aside for school purposes, concluding that no parent had the right to deprive his child of the advantages provided by that fund. 157 Ind. at 330, 61 N.E. at 732.

37. A much later case that clearly articulated the *parens patriae* interest was Shapiro v. Doren, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct. 1950). In that case, Jewish parents were prosecuted for violation of New York's compulsory attendance statute. The children attended an unapproved religious school where the only instruction was in the Bible, the Talmud and elementary Jewish law. *Id.* at 644-45, 99 N.Y.S.2d at 831. In finding the parents guilty, the court stated that the "[r]eligious convictions of parents cannot interfere with the responsibility of the State to protect the welfare of children." *Id.* at 652, 99 N.Y.S.2d at 838. The court clearly found against the parents because of the state's *parens patriae* interest. "Compulsory education laws constitute but one of the many statutes of a government, dedicated to the democratic ideal, which are universally enacted *for the benefit of all of the children* . . . ." *Id.* (emphasis added).

38. In *Shapiro v. Doren*, the court also set out this second interest of the state as "an interest in seeing to it that every child receives a basic secular education since the kind of education our children receive has substantial bearing upon the kind of citizens they will become . . . [and] whether they will later in life be able to take their rightful place in civil society . . . ." *Id.* at 648, 99 N.Y.S.2d at 834-35.

schools in providing education, and the role of parents in determining the content of their children's education. Although some of the cases involved religious schools, the courts analyzed the issue in terms of parental rights to control the education of their children. This analysis survives to some extent even in the modern cases.[39]

Parental Choice of Private Schooling and the State's Interest in Education

In the years following the Civil War, the United States was faced with a massive influx of immigrants.[40] The need to integrate them into American society[41] was reflected in a 1919 Nebraska statute prohibiting the teaching of foreign languages to children below the ninth grade.[42] The statute applied to private as well as public schools.[43] The application of the statute to private schools was challenged in *Nebraska District of Lutheran Synod v. McKelvie*.[44]

In *McKelvie*, certain churches which conducted private schools and foreign language-speaking parents sought to enjoin enforcement of the statute,[45] contending that it impinged upon parental discretion to choose the kind of instruction best adapted to the needs of the children and their religion.[46] They also argued that the schools were fulfilling their duty to the state by providing instruction equivalent to that provided by the public schools, and that they should not be penalized for providing additional instruction.[47] In dealing with the arguments raised in the case, the court found it necessary both to clearly define the state's interest in education and to articulate the reasons why that interest would be advanced by the statute. Finding that the teaching of prescribed subjects in foreign languages interfered[48] with the state's interest in assuring that citizens were familiar with the principles of democracy,[49] the Nebraska Supreme Court upheld the statute.[50] Because the court found that parental notions of

39. *See* cases cited *infra* note 75.

40. *See* L. KOTIN & W. AIKMAN, *supra* note 4, at 26.

41. Education was seen as a means of both providing for an informed electorate, and preventing crime and poverty. *See id.*

42. The statute provided that "1. [n]o person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than English. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade . . . ." 1919 Neb. Laws ch. 249.

43. *See id.*

44. 104 Neb. 93, 175 N.W. 531 (1919), *rev'd*, 262 U.S. 404 (1923).

45. *Id.* at 94, 175 N.W. at 532.

46. *Id.* at 95-96, 175 N.W. at 533.

47. *Id.* at 96, 175 N.W. at 533.

48. *See infra* note 51 and accompanying text.

49. 104 Neb. at 99, 175 N.W. at 534. The court added that education was to "imbue the alien child with the tradition of our past . . . to teach him love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat" or by anyone else. *Id.*

The court buttressed its definition of the state's interest by noting that the law was passed in response to the disclosure that thousands of men who were subject to the draft were unable to speak English and were thus unable to take military commands in that language. *Id.* at 97, 175 N.W. at 533. The court also noted that areas in which enemy sentiment was expressed were those in which children were taught in foreign languages. *Id.*

50. *Id.* at 104, 175 N.W. at 536.

quality education conflicted with the educational goals of the state,[51] the parents did not prevail. At the time of the *McKelvie* decision, parental rights regarding educational decisions were not considered to be constitutional rights. That changed, however, with the United States Supreme Court decisions in *Meyer v. Nebraska*[52] and *Pierce v. Society of Sisters.*[53] These cases established the constitutional right of parents to direct and control the education of their children and led to restrictions on state interference with private education.

In *Meyer*, a parochial school teacher was convicted[54] of violating the Nebraska statute[55] prohibiting the teaching in foreign languages to a child who had not completed the eighth grade. Applying a substantive due process analysis,[56] the Court determined that the statute interfered with the fourteenth amendment liberty interest of parents to control the education of their children[57] and declared the statute unconstitutional.[58] The Court recognized that the purpose of the legislation was to foster a homogeneous people with democratic ideals,[59] but found that the means adopted were arbitrary, and therefore beyond the power of the state.[60] Thus, once the parental right received constitutional protection, the goal of national unity was no longer a sufficient justification for a statute that unreasonably interfered with that right.[61]

The right of parents to control the education of their children was again set forth in *Pierce v. Society of Sisters*.[62] The *Pierce* Court struck down a Oregon statute that required all children to attend public schools.[63] Two private schools[64] sought to enjoin enforcement of the statute, claiming that it interfered with their fourteenth amendment property interests.[65] One school also claimed that the statute interfered with the right of parents to choose the schools where their children would be educated.[66] Again

51. *See id.* at 100, 175 N.W. at 534. The court noted that if foreign languages were used, the time was necessarily being taken away from the study of other subjects prescribed in the curriculum, one of which, of course, was English. *Id.* The court also rejected the argument that teaching the state-prescribed subjects in a foreign language was necessary in order for the children to learn English. *Id.* at 101, 175 N.W. at 535.

52. 262 U.S. 390 (1923).

53. 268 U.S. 510 (1924).

54. The teacher had been convicted of teaching reading in German. 262 U.S. at 396.

55. *See supra* note 42.

56. "[N]or shall any State deprive any person of life, liberty or property without due process of law." U.S. CONST. amend XIV. Substantive due process involved the finding of a liberty or property interest that the state could not arbitrarily abridge. *See* L. TRIBE, *supra* note 13, at 506-07.

57. 262 U.S. at 401. Noting that the so-called "dead languages," Latin, Greek, and Hebrew, were not proscribed, the Court also found that the statute interfered with the interest of modern language teachers to practice their profession. *Id.* The Court also found that the statute interfered with the opportunity of children to acquire knowledge. *Id.*

58. *See id.* at 402.

59. *Id. See also supra* note 38.

60. 262 U.S. at 403.

61. *Id.* at 402.

62. 268 U.S. 510 (1925).

63. *Id.* at 534-35.

64. One school was a religious school and the other was a military academy. *Id.* at 510. *See also supra* note 13.

65. 268 U.S. at 531.

66. *Id.* at 532. *See also supra* note 13.

applying a substantive due process analysis,[67] the Court found that the statute interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control,"[68] and that these rights could not "be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."[69] In contrast with *Meyer*, which discussed the state's interest,[70] the Court in *Pierce* did not address that interest, or the purpose of the statute.

The *Pierce* Court however, in not questioning the state's power to reasonably regulate the private schools,[71] at least implied that there was some state interest that could be protected by reasonable regulation. Specifically, the Court noted that a state could require teachers to be of good patriotic disposition, could also require the teaching of studies "plainly essential to good citizenship," and could prohibit teaching that is manifestly inimical to the public welfare.[72] The interest represented by these "reasonable regulations" is clearly the state's interest in assuring that citizens are familiar with democratic principles.[73] *Pierce* was limited in that it found that the state did not have the power to "standardize its children" by forcing them to attend public schools.[74] Nevertheless, the right of parents to control the education of their children as enunciated in *Pierce* and *Meyer* remains one rationale for limiting state control of private schools.[75]

Although the states could not prohibit private schooling altogether after *Pierce*, there were some attempts to regulate the private schools to such a degree as to destroy their individual character. *Farrington v. Tokushige*[76] concerned a challenge to Hawaii's regulation of foreign language schools. To obtain a permit to operate, these private schools were required to comply with regulations covering curriculum, textbooks, and qualifications of

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67. *See supra* note 56 and accompanying text.

68. 268 U.S. at 534-35. The Court cited *Meyer v. Nebraska* for the quoted language. *Id.* at 534. *See supra* text accompanying note 57.

69. 268 U.S. at 535. Although *Pierce* clearly supports the right of parents to control the education of their children, this support may be merely dicta. The holding of the case seems to be that the state could not compel public school attendance because this would unreasonably interfere with the business interests of the private schools. *Id.* at 535-36. *See* Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 70 W. VA. L. REV. 213, 219 (1973).

70. *See supra* text accompanying note 59.

71. 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.

268 U.S. at 534. *See also infra* notes 81, 128.

72. 268 U.S. at 534.

73. *See supra* note 38. This interest was not sufficient to uphold the statute in *Meyer v. Nebraska*. *See supra* text accompanying note 59.

74. 268 U.S. at 535.

75. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (discussed *infra* notes 80-114 and accompanying text); Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927) (discussed *infra* notes 76-80 and accompanying text); State v. Whisner, 47 Ohio St. 2d 181, 211-16, 351 N.E.2d 750, 768-70 (1976) (discussed *infra* notes 129-48 and accompanying text).

The other principal rationale is the first amendment right to the free exercise of religion. *See generally infra* notes 87-212 and accompanying text.

76. 273 U.S. 284 (1927).

teachers.[77] The United States Supreme Court found that the requirements had gone further than mere regulation, and had deprived parents of "fair opportunity to procure for their children instruction which they think is important and we cannot say is harmful."[78] The Court noted that the challenged statutory provisions were parts of a deliberate plan to strictly control the foreign language schools, and that no adequate reason for the regulation was disclosed.[79] The rights of parents to direct the education of their children, as enunciated in *Pierce* and *Meyer*, were held to supercede Hawaii's attempt to thoroughly regulate these private schools.[80]

Pierce, *Meyer*, and *Farrington* stand for the proposition that although the state may do much to ensure that its citizens are educated,[81] it is limited by restraints imposed by the Constitution.[82] The constitutional restraint applied in the foregoing cases was not imposed by the first amendment.[83] Rather, the restraint found in *Pierce*, *Meyer*, and *Farrington* was the limitation on state power to interfere with the freedom of parents to direct their children's education. This freedom is available to all parents, regardless of their religious beliefs.[84] The state may impinge on that freedom when the state requirement is reasonable.[85] When parents claim that a state educational requirement impinges on the right to free exercise of religion, however, the court must balance the state interest against the first amendment right. This balancing test was articulated in *Wisconsin v. Yoder*.[86]

The Modern Supreme Court: Wisconsin v. Yoder

In *Wisconsin v. Yoder*,[87] members of the Old Order Amish religion had been convicted of violating Wisconsin's compulsory attendance statute which required school attendance until age sixteen. The Amish refused to permit their children to attend school beyond the eighth grade, contending that their religion forbade high school education.[88] The Court applied a

77. *Id.* at 291-95. The statute provided that no school could be conducted in a language other than English or Hawaiian until a fee was paid, written permission was received, and the teachers had permits, *id.* at 291-94, and had pledged to "direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens . . . ." *Id.* at 293-94. No subject was to be taught, or textbook used unless prescribed or permitted by the state. *Id.* at 295.

78. *Id.* at 298.

79. *Id.*

80. *Id.* at 299.

81. *Meyer*, 262 U.S. at 401.

> The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports.

Id. at 402.

82. *Id.* at 401.

83. Kurland, *supra* note 69, at 220.

84. *Id.* at 223.

85. *See supra* note 71 and accompanying text.

86. 406 U.S. 205 (1972). *See supra* note 14 for pre-*Yoder* free exercise cases and the tests applied therein.

87. 406 U.S. 205, 207 (1972).

88. The Amish believed that if their children attended high school, the parents would risk

three-part test[89] which first required a showing that the beliefs of the Amish were sincere[90] and rooted in their religion.[91] If such a religious belief were shown, the Court then required a showing that the requirement of secondary education interfered with the religious beliefs.[92] Finally, if such interference were shown, the Court required a determination that the state's interest in secondary education was sufficiently important[93] to override the first amendment interest and could not otherwise be served than by the state's requirement.[94]

The state stipulated that the beliefs of the Amish were sincere.[95] Accordingly the Court proceeded to determine if the requirement of secondary education actually infringed on those religious beliefs.[96] The Court extensively examined the Amish life and culture[97] to determine whether application of the compulsory attendance requirement to their children would burden the Amish' religious beliefs. This detailed and extensive examination led the Court to conclude that the application of the requirement of secondary education to these children "contravene[d] the basic religious tenets and practices of the Amish faith"[98] and, if enforced, would "gravely endanger if not destroy the free exercise of [the Amish'] religious beliefs."[99]

Since the Amish had established that the statute interfered with their free exercise of religion, the Court examined the interests of the state to determine if there was a state interest of sufficient magnitude to override the free exercise interest.[100] Wisconsin advanced two claims of state interest.[101] The first was that "some degree of education is necessary to prepare

censure by the church community, and would endanger their own and their children's salavation. *Id.* at 209.

89. *See supra* notes 14-18 and accompanying text.

90. 406 U.S. at 209.

91. *Id.* at 215. *See supra* note 15.

92. 406 U.S. at 214.

93. *Id.* It is not clear if the "interest of sufficient magnitude" test would require the same showing as does the "compelling state interest" test of equal protection adjudication. The Court had previously referred to the requirement of "compelling state interest" in the context of a free exercise claim in Sherbert v. Verner, 374 U.S. 398, 406 (1963).

94. 406 U.S. at 215.

95. *Id.* at 209.

96. *See supra* text accompanying note 92.

97. 406 U.S. at 216-19. The Court noted that the Amish beliefs were shared by an organized group and were intimately related to daily life, *id.* at 216; that the Amish way of life has remained virtually unchanged for several hundred years, *id.* at 216-17; that their rejection of modern society and their continued attachment to nature and the soil is a way of life that is inherently simple and uncomplicated. *Id.* at 217.

98. *Id.* at 218. The Court found that modern secondary education would involve exposing the Amish children to values and programs that conflicted with the Amish way of life and religious beliefs. *Id.* at 217-18. This exposure was seen to hinder the child's integration into the Amish community. *Id.* at 218.

99. *Id.* at 219. Justice Douglas dissented stating that the Court assumed that the interests of the parents coincided with the interests of the children. *Id.* at 242. He asserted that the rights of the child should also be considered. *Id.* Justice White noted in his concurrence that there was evidence in the record showing that many children leave the Amish community when they come of age. *Id.* at 240. He concurred with the majority opinion, however, because he found that the state's interest had already been largely satisfied by the eight years of formal schooling permitted by the Amish. *Id.* at 241.

100. *Id.* at 214.

101. *Id.* at 221.

citizens to participate in our open political system if we are to preserve freedom and independence."[102] The second was that "education prepares individuals to be self-reliant participants in society."[103] Again focusing on the Amish way of life, the Court found that requiring these children to attend school for one or two years more than their religion permitted would do little to serve the state interests.[104] Thus, the Court concluded that the state's interest were not sufficient to override the free exercise interest of the Amish.

In referring to this weighing of interests, the Court stated that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and -interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . ."[105] The Court's opinion in *Yoder* suggests that the balancing of interests would take place only after a finding that the state's requirement had impinged on the religious belief. The balancing would be between the interest in the free exercise of religion and the interest of the state in upholding its requirements.[106] Although the Court did engage in a lengthy discussion of these competing interests,[107] the balancing actually occurred earlier in the Court's analysis where the Court found that the compulsory attendance statute interfered with the Amish' religious beliefs. In extensively examining the Amish culture and way of life, the Court balanced the educational goals of the Amish against those of the state for children generally and found that the state's educational goals interfered with the Amish' religious beliefs.

Yoder was therefore a case of competing educational goals.[108] While the goal of the state may have been to prepare children for a life in modern society,[109] the goal of the parents was to prepare their children "for a life in the separated agrarian community that is the keystone of the Amish faith."[110] The Court examined the education that the Amish provided to their children,[111] and because the "value of all education must be assessed in terms of its capacity to prepare a child for life,"[112] the Court determined that the education provided by the Amish was sufficient to prepare their

102. *Id. See also supra* note 38.

103. 406 U.S. at 221. This interest seems to be the state's *parens patriae* interest. *See supra* note 36.

104. *Id.* at 222, 227. It would seem that the eight years of formal education permitted by the Amish satisfied the state's interest in "some degree of education." The evidence also clearly supported the finding that the Amish were self-reliant participants in society. *Id.* at 222. Although the state seemed to be asserting the interest of the individual child who might choose to leave the Amish community to participate in modern society, the Court focused on the Amish community as a whole and found it to be self-reliant. The Court later noted, however, that nothing in the record suggested that an individual who chose to leave the Amish community would fail to find work outside the community. *Id.* at 224.

105. *Id.* at 214.

106. *See supra* text accompanying note 105.

107. *See supra* notes 100-04 and accompanying text.

108. L. TRIBE, *supra* note 13, at 856.

109. 406 U.S. at 222.

110. *Id.*

111. *Id.* at 222-23.

112. *Id.* at 222.

children for life in an Amish community.[113] Thus, the Court accepted the parents' goal as the only legitimate goal regarding the education of these children.[114]

The *Yoder* Court carefully limited its holding to instances where a statute infringes on first amendment rights. The Court cautioned that "a way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular consideration . . . ."[115] Thus, the parental right to direct the education of children, enunciated in *Pierce* and *Meyer*, may not be sufficient to override the state's interest in compulsory education. When parental rights are combined with a free exercise claim, however, a stronger state interest and a less restrictive alternative would be required.[116]

The *Yoder* Court noted that the Amish showing was "one that probably few other religious groups or sects could make."[117] Here the Court actually seems to be referring to two "showings." The first is the interrelationship between the Amish way of life and their religious beliefs.[118] The second is the "even more difficult" one of demonstrating the adequacy of their alternative vocational education in meeting the state's interests.[119] In light of these "showings", the Court determined that the state should have demonstrated "with more particularity how its admittedly strong interest in compulsory education" would be harmed by granting an exemption to the Amish children.[120]

State Attempts to Regulate Private Religious Schools

One area of conflict that has arisen after *Yoder* is caused by the tendency of certain fundamentalist churches to establish their own schools.[121]

113. *Id.* at 224. "Beyond this, [the Amish] have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235.

114. L. TRIBE, *supra* note 13, at 856.

115. 406 U.S. at 215.

116. *See* L. TRIBE, *supra* note 13, at 856. "Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Yoder*, 406 U.S. at 233.

117. 406 U.S. at 235-36.

Contrary to the majority's statement in *Yoder* that few other religious groups could make the showing that the Amish did, the results of other challenges to compulsory attendance statutes in state courts seem to indicate that other religious groups can, indeed, make a similar showing. When carefully analyzed, however, the decisions of the state courts indicate that individuals asserting that state compulsory attendance requirements infringe on religious beliefs do not make the showing that the Amish made.

118. *Id.* at 235.

119. *Id.* at 235-36.

120. *Id.* at 236. If *Yoder* requires the state to show that its interest is "compelling," it is difficult to see how any state interest in education is sufficient to warrant the denial of an exemption to a compulsory attendance statute. The invocation of the compelling state interest test "is a statement of a conclusion rather than a measure of constitutionality." Kurland, *supra* note 69, at 232. Professor Kurland points out that Chief Justice Burger, the author of the majority opinion in *Yoder*, had earlier condemned the compelling state interest standard. *Id.*

121. *See* Carper, *The Whisner Decision: A Case Study in State Regulation of Christian Day*

Some parents have claimed that their religion forbids enrolling their children in public schools, and that state accreditation and regulation of the church schools unduly burdens religious freedom.[122] State court responses to these claims have been mixed. This is due, in part, to the courts' use of the *Yoder* test.[123] Examination of the first amendment right to the free exercise of religion occurs in the first and second parts of the *Yoder* test. Examination of the state's interest should occur in the third part.[124] The balancing of the interest of the state in the regulation of private religious schools and the interest of parents in the free exercise of religion also should occur in the third part of the test.

In part two of the test, the court examines the effect of the state regulation on the religious belief, to determine whether the regulation actually interferes with the parents' religious beliefs. In addition, some courts seem to examine the effect of the parents' beliefs on the state's interest in education in part two of the test.[125] Accepting that the state's interest is in "education," the courts examine the education that actually takes place under the parents' direction in the religious school.[126] Some recent cases have examined the scores of children on standardized tests as a measure of that education, and one court and some legislatures have mandated standardized testing as an alternative to direct state regulation of the private religious schools.[127]

The *Yoder* test was applied to the issue of the reasonableness of state regulation[128] of private religious schools by the Ohio Supreme Court in *State v. Whisner*.[129] In *Whisner*, the parents had sent their children to a private, religiously oriented school that had not sought state approval and was not in conformance with state minimum standards.[130] The state

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Schools, 24 J. CHURCH & ST. 281, 281 (1982); Hitchcock, *Church, State and Moral Values: The Limits of Pluralism*, 44 L. & CONTEMP. PROB. 3, 20 (1981).

122. *See generally infra* notes 129-212 and accompanying text.

123. *See supra* notes 14-18 and accompanying text.

124. *See supra* note 17 and accompanying text.

125. *See infra* notes 189, 211 and accompanying text.

126. *See infra* notes 143-46, 176 and accompanying text.

127. *See infra* note 226 and accompanying text; *see also infra* note 228.

128. While the United States Supreme Court has firmly established the validity of state regulation of private schools, such regulation is valid only when it is reasonable. Runyon v. McCrary, 427 U.S. 160, 178 (1976) ("While parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) ("A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."). *See also supra* notes 71, 81.

129. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). For an excellent analysis of the case, see Note, *Public Regulation of Private Schools*, 37 OHIO ST. L.J. 899 (1976). For some interesting factual background, see Carper, *supra* note 121.

130. 47 Ohio St. 2d at 182, 351 N.E.2d at 752. One of the challenged regulations required that the school meet all of the standards before a charter could be issued. *Id.* at 201, 351 N.E.2d at 762. The parents objected to this regulation contending that agreement to comply with all standards would remove their ability to control the school. *Id.* Another regulation required that the total instructional time allocated each week should be four-fifths to basic studies, and one-fifth to physical education, "special activities," and the arts. The parents alleged that since the standard did not allot time in which they could give religious training, it severely restricted their ability to

brought suit for violation of its compulsory attendance statute.[131] The parents defended by contending that the state's minimum standards burdened their first amendment right to the free exercise of religion.[132] They alleged that their religion involved a life of separation from the world and ungodliness, devoted to the propagation of the Gospel.[133] They also alleged that they could not find an approved school in the area that afforded an education for their children consistent with these beliefs.[134] The parents therefore decided to open their own school.[135]

Applying the first part of the *Yoder* test,[136] the Ohio court found that the parents' beliefs were both religious and truly held.[137] Under the second part of the *Yoder* test, the court interpreted the language of the state's regulations in such a way as to find that they unduly burdened the parents' right to the free exercise of religion.[138]

The state had made no attempt to justify the necessity of the minimum standards[139] and the court refused to speculate on the nature of the

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incorporate religious training into the child's school day. *Id.* An additional state requirement was that all activities of the school must conform to policies adopted by the state board. *Id.* The parents opposed this requirement because it provided a "blank check" to the state to control the school. *Id.* Another regulation required the school to be involved in cooperation and interaction with the community. *Id.* at 201-02, 351 N.E.2d at 762-63. The parents asserted that their school could not seek direction or contact with the community because of their belief in a life of separation from the community. *Id.* at 202, 351 N.E.2d at 763.

A criticism of the court's finding on each of the regulations is contained in Note, *supra* note 129.

131. 47 Ohio St. 2d at 182, 351 N.E.2d at 752.

132. *Id.* at 189, 351 N.E.2d at 756.

133. *Id.* at 187, 351 N.E.2d at 755. The parent's allegations of a life of "separation" were remininscent of the allegations of the Amish in Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

134. 47 Ohio St. 2d at 188, 351 N.E.2d at 755.

135. The school used the Accelerated Christian Education program, an individualized instruction program. *Id.* at 189, 351 N.E.2d at 755-56.

136. *See supra* notes 90-91 and accompanying text.

137. 47 Ohio St. 2d at 199, 351 N.E.2d at 761. This would seem to be the same as "rooted in religion" and "sincere." *See Yoder*, 406 U.S. at 209, 215. *See also supra* notes 90-91 and accompanying text. The *Whisner* court expressly found that the parents' religious beliefs were "sincere." 47 Ohio St. 2d at 199, 315 N.E.2d at 762.

138. 47 Ohio St. 2d at 210, 351 N.E.2d at 765. For a interpretation upholding the validity of the regulations, see Note, *supra* note 129, at 905-12.

The court in *Whisner* then departed from *Yoder* in that it found a second reason, wholly independent of the free exercise claim, for invalidating the state standards. 47 Ohio St. 2d at 211-16, 351 N.E.2d at 768-70. The court found that the "standards were so pervasive and all-encompassing that total compliance . . . by a non-public school would effectively erradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children." *Id.* at 211-12, 351 N.E.2d at 768. Thus, *Whisner* indicated that parents may not have to attach a first amendment free exercise claim to their challenge in order to gain exemption from the operation of state regulations.

> Under the facts of this case, the right of appellants to direct the upbringing and education of their children in a manner which they deem advisable, indeed essential, and which we cannot say is harmful, has been denied by application of the state's "minimum standards" as to them.

Id. at 216, 351 N.E.2d at 770.

This language is similar to that of Farrington v. Tokushige, 273 U.S. 284, 299 (1927) (discussed *supra* notes 76-80 and accompanying text), which applied a substantive due process ("rational basis") analysis to the state regulation of foreign language schools. It is unclear whether the *Whisner* court was applying the same test. *See* Note, *supra* note 129, at 917-20. *See also infra* note 141.

139. 47 Ohio St. 2d at 217, 351 N.E.2d at 771.

state's interest in them.[140] The court, however, noted the difficulty in imagining a state interest sufficient to override the parents' first amendment free exercise claim.[141] Finding a burden on the parents' free exercise of religion, the court decided that the standards could not be applied to a private religious school.[142]

The court, however did examine the education that was actually taking place in this school. The school was taught by a certified teacher and basic subjects were included in its curriculum.[143] The school's teaching materials were nationally recognized and used in many private religious schools.[144] The teacher testified that most of the students had evidenced excellent performance on standardized achievement tests.[145] While this school might not have been in conformance with the state standards, it probably was providing the students with an education that was comparable to that provided by the public schools or accredited private schools. Thus, the state's interest in education was probably being met. Therefore, if the state had articulated its interests in education, and if the court had balanced those interests against the interest of the parents in the free exercise of religion, the religious interest would still have prevailed.[146]

To the *Whisner* court, the all-inclusiveness of the regulations were sufficient to permit it to find that the regulations went beyond the bounds of reasonableness, and thus interfered with the right to the free exercise of religion in this, or any other, private religious school.[147] Unlike the *Yoder* Court, the *Whisner* court did not expressly find that any particular regulation "contravened the basic religious tenets and practices of [the parents'] faith."[148]

After *Whisner*, the Ohio State Board of Education did not withdraw

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

141. *Id.* The court went on to note that it would be equally difficult to imagine a "state interest sufficiently substantial to sanction abrogation of appellants' liberty to direct the education of their children." *Id.* The court discussed in a footnote the application of the "compelling state interest" test to the claim of infringement of free exercise of religion and determined that the standard was the appropriate one. *Id.* at 217 n.17, 351 N.E.2d at 771 n.17. It seems, however, that the court also applied the compelling state interest standard to the second claim of infringement of the parents' right to direct the education of their children. *See id.* at 218, 351 N.E.2d at 771. *See also supra* note 138. Both *Meyer* and *Pierce* recognized that claims involving parental rights to control the education of their children were to be tested against the "reasonable relation" rather than "substantial interest" standard. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

142. *See* 47 Ohio St. 2d at 218, 351 N.E.2d at 771. The court's holding is broad and would seem to invalidate the regulations as applied to all religious schools. *Cf.* State *ex rel.* Nagle v. Olin, 64 Ohio St. 2d 341, 353, 415 N.E.2d 279, 288 (1980). In fact, after the *Whisner* decision, many private religious schools returned their charters to the state. *See* Carper, *supra* note 121, at 298 n.59.

143. 47 Ohio St. 2d at 188, 351 N.E.2d at 755. The school was in session for six hours per day, one hundred eighty days per year, reported attendance to public officials, and submitted to fire, health and safety inspections. *Id.* at 189, 351 N.E.2d at 756.

144. *Id.* at 189, 351 N.E.2d at 755-56. *See supra* note 135.

145. 47 Ohio St. 2d at 189, 351 N.E.2d at 756. *See infra* notes 229-53 and accompanying text for a discussion of standardized achievement testing.

146. In *Yoder*, the Court concluded that the Amish were meeting the state's interests in education. *See supra* note 113 and accompanying text.

147. 47 Ohio St. 2d at 204, 351 N.E.2d at 764.

148. *Yoder*, 406 U.S. at 218.

or rewrite the regulations.[149] This resulted in a second challenge. In *State ex rel. Nagle v. Olin*,[150] the Ohio Supreme Court again considered the regulations at issue in *Whisner*. In *Nagle*, the defendant had been convicted of violating the compulsory attendance statute.[151] Defendant Olin had sent his seven-year-old daughter to a one-room Amish school.[152] The school did not have a state charter and did not conform to state minimum standards.[153] The school's teacher was not certified and had only an eighth grade education.[154] Of the twenty-six children attending the school, Olin's child was the only non-Amish student.[155] The father, who considered himself a "born-again" Biblical Christian, contended that the social environment and curriculum of the public schools were inconsistent with his religious beliefs and that there was no other school near his home to which he could send his child for an education that was consistent with those beliefs.[156]

Applying the first part of the *Yoder* test, the Ohio court initially determined that Olin's religious beliefs were truly held.[157] The court then turned to the second part of the *Yoder* test to determine if Olin had demonstrated that the Ohio minimum standards infringed upon those beliefs. Many of Olin's objections to public education were objections to contemporary society as a whole,[158] and many of the aspects of the public schools to which Olin objected[159] were not attributable to Ohio's minimum standards for approval of private schools.[160] Nevertheless, the court found that the state minimum standards did infringe on Olin's religious beliefs.[161] This stemmed in part from the court's acceptance of testimony that the minimum standards required the teaching of humanistic values which were alien to Olin's fundamentalist beliefs.[162] Thus, Olin's beliefs forbade sending his child to a school which conformed to the minimum

149. State *ex rel.* Nagle v. Olin, 64 Ohio St. 2d 341, 353, 415 N.E.2d 279, 287 (1980).

150. 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980).

151. *Id.* at 341, 415 N.E.2d at 280.

152. *Id.* at 341, 415 N.E.2d at 281.

153. *See id.* at 348, 415 N.E.2d at 284.

154. *Id.* at 341-42, 415 N.E.2d at 281. The texts used at the school were of near-ancient vintage, the school had no electricity or indoor plumbing, and had not been inspected for compliance with health and safety regulations. *Id.* at 342, 415 N.E.2d at 281.

155. *Id.*

156. *Id.* at 344, 415 N.E.2d at 282. Olin also objected to the mode of dress of public school students, and that they watched television, which he considered destructive. He also believed that the public schools taught things that were not true. For example, he believed that light does not travel in a straight line. *Id.* at 343, 343 n.3, 415 N.E.2d at 282, 282 n.3.

157. *Id.* at 350, 415 N.E.2d at 286.

158. *Id.* at 351, 415 N.E.2d at 286.

159. *See supra* note 156.

160. 64 Ohio St. 2d at 351, 415 N.E.2d at 286.

161. *Id.* at 352, 415 N.E.2d at 286.

162. *Id.* at 352, 415 N.E.2d at 287. For a thorough discussion of "secular humanism," see Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1979). The authors set out the six tenets of secular humanism as: 1) denial of the relevance of God or supernatural agencies, *id.* at 37; 2) "the belief in the supremacy of 'human reason,'" *id.* at 38; 3) "belief in the inevitability of progress," *id.* at 39; 4) "the belief in science as the guide to human progress and the ultimate provider of an alternative to both religion and morals," *id.* at 42; 5) "the belief in the self-sufficiency and centrality of Man," *id.* at 43; and 6) "belief in the absolutism of evolution," *id.* at 46.

standards.[163] The court did not elaborate on which regulations, if any, mandated the teaching of "humanistic values."[164] Nor did the court define "humanistic values." It seems that the court sustained Olin's free exercise claim because the board did not withdraw or rewrite the regulations found unreasonable on their face in *Whisner*.

After determining that the standards burdened Olin's religious beliefs, the court proceeded to the third part of the *Yoder* balancing test,[165] to determine whether or not the state interest was sufficient to override the free exercise interest.[166] The court accepted the state's interest in assuring that children receive a quality education as being compelling,[167] but noted that a less restrictive set of standards could be adopted[168] which still protected that interest. "Until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in education of children in private elementary schools, the balance is weighted, *ab initio*, in favor of a First Amendment claim to religious freedom."[169] As there was no clear showing that any particular regulation burdened Olin's free exercise of religion, it is unfortunate that the court discussed only the state's interest in its regulatory scheme as indicative of its interest.[170] The court missed the opportunity to discuss whether the state's interest as stated in the enabling legislation—to require that private schools provide high quality education—would be sufficient to override a free exercise interest.[171] The court could thus have

163. 64 Ohio St. 2d at 352, 415 N.E.2d at 287.

164. In *Whisner*, discussed *supra* notes 129-48 and accompanying text, this same court had discussed the "humanistic values." 47 Ohio St. 2d at 211, 351 N.E.2d at 767. The court stated that a portion of the interpretative and explanatory information contained in the Ohio minimum standards might be interpreted as promoting secular humanism and might be applied to the *Whisner* parents in such a way as to burden their free exercise of religion. *Id.* The specific portions of the interpretative and explanatory information at issue stated: "1. Common problems are solved through consensus of thinking and action of individuals in the group. 2. Individuals have a responsibility of authentic citizenship as a member of the school community, state, nation and world. 3. Citizens have a responsibility for the welfare of others and for being willing to sacrifice for the common good." *Id.* at 202, 351 N.E.2d at 763. Another portion stated that "[o]rganized group life of all types must act in accordance with established rules of social relationships and a system of social controls." *Id.* at 203, 351 N.E.2d at 763. Finally, an interpretative section provided that "[t]he health of the child is perhaps the greatest single factor in the development of a well-rounded personality. . . . For [this] reason health education is considered an integral part of the total education program. Its place in the curriculum becomes increasingly important as automation, population growth, changing moral standards and values, mounting pressures, and other changes in our society create new or intensify existing health problems." *Id.* The *Whisner* parents had objected to these guidelines contending that they espoused a "humanism" philosophy and that God's moral standards do not change. *Id.*

The *Whisner* court explicitly found that these interpretative and informational guidelines were not part of Ohio's minimum standards. *Id.* at 211, 351 N.E.2d at 767-68.

165. *See supra* note 17 and accompanying text.

166. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *Nagle*, 64 Ohio St. 2d at 352, 415 N.E.2d at 287.

167. This same court, in *Whisner*, did not discuss the state's interest in education as being "compelling." In fact, the court found it "difficult to imagine" a state interest sufficient to uphold the regulations. *Whisner*, 47 Ohio St. 2d at 218, 351 N.E.2d at 771.

168. 64 Ohio St. 2d at 354-55, 415 N.E.2d at 287-88.

169. *Id.* at 354-55, 415 N.E.2d at 288.

170. *Id.* at 352, 415 N.E.2d at 287.

171. *See id.* at 354, 415 N.E.2d at 288.

It is possible, of course, that the state might not have an interest in "high quality" education sufficient to override a free exercise interest. If the state's interest is merely in providing that

provided guidance to the Department of Education and the legislature regarding the kind of regulation that would be acceptable to the court.[172]

The state in *Nagle* had not attempted to impose the minimum standards on the Amish school,[173] and in light of *Yoder* it probably could not have done so. While the school might have provided an adequate education for Amish children, there was no indication that Olin was rearing his child to lead a life in an agrarian, rural community, separate and apart from society and founded on religious beliefs.[174] It is possible, therefore, that the Olin child would be inadequately prepared to face adulthood in our modern "mainstream" society. The state's interest that Jennifer Olin receive a high quality education was not being met at this school.[175]

As in *Whisner*, testimony indicated that the Olin child scored well above her grade level on standardized achievement tests.[176] It is unclear what weight, if any, the court placed on this evidence. Perhaps the court perceived these test results as indicating that the school was meeting the state's interest in education. This seems doubtful, however, in light of the court's characterization of the school as being "in gross disparity with the most fundamental educational protections that the state minimum standards were designed to assure."[177] The *Nagle* court clearly indicated that Ohio should rewrite its standards so as to make them reasonable.[178]

The *Whisner* and *Nagle* decisions both dealt with overbroad state regulation of private religious schools. In both cases, the court expressly found that the threshold requirement of a belief rooted in religion was met.[179] It was the failure to pass this threshold showing that led to a different result in *State v. Kasuboski*,[180] decided by the Wisconsin Court of

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citizens are educated so that they might intelligently exercise the franchise, arguably only minimal education is necessary.

172. The court did note that the North Dakota Supreme Court had upheld certain regulations in State v. Shaver, 249 N.W.2d 883 (N.D. 1980) (discussed *infra* notes 196-217 and accompanying text). 64 Ohio St. 2d at 354, 415 N.E.2d at 288. Perhaps regulations similar to those upheld in *Shaver* would also be upheld by the Ohio court.

173. 64 Ohio St. 2d at 348, 415 N.E.2d at 284.

174. *See Yoder*, 406 U.S. at 217.

175. The *Nagle* court noted that the Amish school, unlike the school in *Whisner* which had a certified, college-educated teacher and taught a full range of secular subjects, was in "gross disparity with the most fundamental educational protections the state's minimum standards were designed to assure." 64 Ohio St. 2d at 348, 415 N.E.2d at 284.

176. Jennifer Olin, age seven, was probably in the first or second grade. She was tested near the end of her first year at the school by a guidance counselor from a nearby Christian school. The child's reading score was equivalent to that of a child who had completed the eighth month of the fourth grade; her mathematics score was equivalent to one who had completed the eighth month of the second grade; her language score was equivalent to one who had completed the ninth month of the third grade, and her spelling score was equivalent to one who had completed the third month of the third grade. *Id.* at 342, 415 N.E.2d at 281.

177. *Id.* It is unlikely that the court was advocating standardized testing as an alternative to direct regulation. This is because the Court cited State v. Shaver, 294 N.W.2d 883 (N.D. 1980) (discussed *infra* notes 189-208 and accompanying text), as an example of regulations that might be approved by a court. *Shaver* rejected standardized testing as an alternative to state regulation. 294 N.W.2d at 897.

178. 64 Ohio St. 2d at 353, 415 N.E.2d at 288.

179. *See supra* text accompanying notes 137, 157.

180. 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978). The Kasuboskis were members and ministers of the Life Science Church, and claimed to have withdrawn their eight children from the public schools for religious reasons. *Id.* at 411, 275 N.W.2d at 102-03.

Appeals.

In *Kasuboski*, the parents had withdrawn their children from the public schools apparently at the suggestion of the president of their church who had urged parents to educate their children in church-supported schools.[181] The parents were then convicted of violation of the state's compulsory attendance statute.[182] The church opposed racial integration and the teaching of humanism and racial equality.[183] Auxiliary churches, chartered by the main church, were free to make up their own tenets as long as they did not contradict those of the main church.[184] The Kasuboskis had established their own auxiliary church and, apparently, were the only members.[185] Their auxiliary church forbade public school attendance because the public schools taught humanism and racial equality, and because the Kasuboskis believed that the public schools were "influenced by Jews."[186]

The court found that the beliefs of the Kasuboskis regarding education were not rooted in religious beliefs.[187] The court found that the Kasuboskis' decision to withdraw their children from public school was based on the Kasuboskis' ideological or philosophical beliefs.[188] Thus, the Kasuboskis failed to meet the first part of the *Yoder* test. The court felt that "[a]cceptance of the Kasuboskis' claim of religious protection would open a door to all who object to part or all of the subject matter being taught in the public schools."[189] Therefore, the court upheld the Kasuboskis' conviction for violation of the compulsory attendance statute.[190]

Even though the result in *Nagle*[191] might be criticized as going too far in permitting religious beliefs to overcome the state's interest in education, the *Kasuboski* court's characterization of the defendants' beliefs as philosophical, thus cutting off further analysis of the issues may not have gone far enough in protecting legitimate religious beliefs. In *Kasuboski*, the main church did not forbid education.[192] The objection to education was a tenet of the auxiliary church established by the Kasuboskis in their

181. *Id.* at 412, 275 N.W.2d at 103. Because the Kasuboskis apparently were the only members of the auxiliary church, *see infra* text accompanying note 185, it is unclear what kind of education, if any, the children were receiving. The Kasuboskis did not present the affirmative defense of an adequate private education. 87 Wis. 2d at 413, 275 N.W.2d at 104.

182. *Id.* at 410-11, 275 N.W.2d at 102.

183. *Id.* at 415, 275 N.W.2d at 105. The church's fundamental principles were said to be contained in the Bible, the Declaration of Independence, and the United States Constitution except for the sixteenth amendment (income taxes), the use of paper money, and the twenty-fifth amendment (replacing disabled president and filling vacancy in the office of vice president). *Id.* at 411, 411 n.3, 275 N.W.2d at 103, 103 n.3. The church required its members to reject the principle that the individual exists for the sake of the state, and not adhere to the principle that the individual lives for himself, his family, and those whom he chooses to serve. *Id.* at 412, 275 N.W.2d at 103.

184. *Id.* at 412-13, 275 N.W.2d at 103.

185. *Id.* at 413, 275 N.W.2d at 103.

186. *Id.*

187. *Id.* at 417, 275 N.W.2d at 106.

188. *Id.* In fact, many of the church members sent their children to public school, and were not deemed to be sinners for doing so. *Id.* at 415, 275 N.W.2d at 105.

189. *Id.* at 418, 275 N.W.2d at 106.

190. *Id.*

191. *See supra* notes 150-79 and accompanying text.

192. The church leaders agreed that the church left it to the individual consciences of its mem-

home. If the court found that the beliefs were indeed religious, the court simply could have proceeded to the second part of the *Yoder* test and found that the state's requirement of compulsory school attendance did not infringe on the Kasuboskis' free exercise of religion.[193] While the Kasuboskis may have had beliefs which forbade attendance at public school, attendance at private schools complied with the compulsory attendance statute.[194] Therefore, the compulsory attendance statute did not necessarily infringe on the Kasuboskis' free exercise rights.[195]

A North Dakota court took this approach and found that the defendants had not shown that the regulations at issue had infringed on their right to the free exercise of religion. In *State v. Shaver*,[196] the defendants were convicted of violating North Dakota's compulsory attendance statute because their children were attending an unapproved fundamentalist Baptist school.[197] The school had not sought approval as mandated by North Dakota law,[198] contending that it would be against the group's religious principles to seek such approval.[199]

The court first found that the defendants' religious beliefs were sincerely held.[200] It then examined the burden the approval requirement imposed on the free exercise of the beliefs.[201] The church pastor testified that the school would not seek approval because the church members felt that such approval would permit the state, rather than God, to control the school.[202] The only specific objection that the church members had was to the state requirement that teachers be certified.[203] The court found that this requirement imposed only a minimal burden on the school, as it was

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bers to decide whether to withdraw their children from public schools. 87 Wis. 2d at 412, 275 N.W.2d at 103.

193. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

194. *See* 87 Wis. 2d at 418, 275 N.W.2d at 102.

195. It is possible, of course, that there was no private school in the area that would avoid the teaching of "humanism" and racial equality. Had the court ever reached the second part of the *Yoder* test, the Kasuboskis might have made this showing. For an opinion that found sufficient state interests to outweigh a religious belief in racial separation, see Brown v. Dade Christian Schools, 556 F.2d 310, 321-24 (5th Cir. 1977) (Goldberg, J., concurring).

196. 249 N.W.2d 883 (N.D. 1980).

197. *Id.* at 885. The school used the Accelerated Christian Education program, the same as was used in the school in *Whisner*. *Id.* at 886. *See supra* note 135.

198. The North Dakota minimum requirements for approval of a private school are set forth in N.D. CENT. CODE § 15.34.1-03 (1981). These requirements are: (1) That the teachers are legally certified in the state of North Dakota; (2) That the subjects offered are in accordance with § 15-38-07 (spelling, reading, writing, arithmetic, language, English grammar, geography, United States history, civil government, nature study, elements of agriculture, physiology, and hygiene—including the nature of alcoholic drinks and narcotics), § 15-41-06 (four units per year of high school work), and § 15-41-24 (high school minimum curriculum: four units of English, three units of mathematics, four units of science, three units of social studies, one unit of health and physical education, one unit of music, and six units of certain elective courses); and, (3) That the school is in compliance with health, fire, and safety laws. *Id.* § 15.34.1-03.

199. 249 N.W.2d at 886-87. The religion of the parents commanded them to educate their children consistent with the teachings of the Bible. *Id.* at 885-86. The parents quoted Proverbs 22, verse 6: "Train up a child in the way he should go, and when he is old, he will not depart from it." *Id.* at 886 n.2. The parents in *Whisner* had relied on the same passage. 47 Ohio St. 2d at 190, 351 N.E.2d at 756.

200. 249 N.W.2d at 891. The state had not disputed this finding. *Id.*

201. *Id.* at 891.

202. *Id.* at 887.

203. *Id.* at 893. The church pastor testified that the curriculum did not require a certificated

possible that a teacher be certified, as required by the state, and "born again" as required by the school.[204] Because the court found that the tenets of the church did not forbid a public education[205] and did not forbid compliance with any of the specific requirements necessary for state approval of the school,[206] the court found it difficult to understand the defendants' refusing to seek state approval of their school.[207]

The court then assumed, however, that the approval requirement did burden the free exercise of religion, and proceeded to examine the state's interest in the education of the children under the third part of the *Yoder* test.[208] The court noted that the state's interest was set out by the North Dakota Constitution: "A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people is necessary in order to insure the continuance of that government and the prosperity and happiness of the people."[209] The constitution also stated that the legislature should take such steps as necessary "to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements."[210] The court found that this state interest warranted the requirement that the school seek and obtain state approval as any minimal burden imposed on the free exercise of religion was far outweighed by the state's interest in the regulation of education.[211] The court therefore found that the requirement of attendance at an approved school was necessary to protect the state's interest.[212]

The evidence indicated that the children's academic achievements were above average for their grade level as measured by standardized tests.[213] Examining the parents' contention that the state could institute a program of standardized testing as a less restrictive alternative, the court stated that the legislature had not deemed such testing an appropriate means to monitor the achievement of private school students, and that there was some question as to the validity of standardized tests.[214] Without the regulation of schools, the state would not have reasonable assurance that its interest in education would be protected.[215] Until "other means of

teacher and that the same ladies who taught Sunday School also taught in the day school. *Id.* at 887.

204. *Id.* at 893-95.

205. *Id.* at 893.

206. *Id.* at 895.

207. *Id.*

208. *Id.* at 895.

209. *Id.* at 895-96. This interest is the state's interest in ensuring a democratic society. *See supra* note 38.

210. 249 N.W.2d at 896.

211. *Id.* at 897.

212. *Id.*

213. *Id.* at 886-87. The evidence also indicated that many of the children had made remarkable academic progress in this school. *Id.* at 887. The majority of the students had scored below grade level on standardized tests before entering the school. *Id.* After attending the religious school, many of the students had progressed to their proper grade level. *Id.* In fact, there was undisputed testimony that the achievement of students, as a whole, was somewhat ahead of students in the public schools. *Id.*

214. *Id.* at 897.

215. *Id.* at 900.

assuring quality education . . . may evolve . . . [the] means [adopted by the state] appears to us to be proper."[216] Another court, however, even in the absence of legislative approval, has decreed that standardized testing is a less restrictive alternative that must be used.[217]

The Kentucky Constitution explicitly provides that no person shall "be compelled to send his child to any school to which he may be conscientiously opposed."[218] In *Kentucky State Board v. Rudasill*,[219] the Kentucky Supreme Court ruled that a statute requiring attendance at public or approved private schools violated this provision of the Kentucky Constitution.[220] The case was brought by several church schools and parents.[221] The plaintiffs objected to state regulations requiring teacher certification and prescribing textbooks in the private schools.[222]

The court recognized that the interest of the state was that children be educated to be good citizens,[223] but found that requiring schools to obtain approval went too far in light of the provision in the Kentucky Constitution. In addition, the court found that the teacher certification requirement did not necessarily ensure that teachers would be able to instruct the students to become citizens.[224] The court further found that the parents' objections to certain textbooks went to the very heart of their objections to the public schools.[225] The court accordingly held that "[i]f the legislature wishes to monitor the work of private and parochial schools in accomplishing the constitutional purpose of compulsory education, it may do so by an appropriate standardized achievement testing program."[226] Thus, the interest of the state could be met through an alternative less restrictive than approval and regulation of the schools.

Rudasill, as decided by the Kentucky Supreme Court, was not a free exercise case because it was decided on independent state constitutional grounds.[227] Therefore, the court did not apply the *Yoder* balancing test. The case is important however, because it sets out the requirement of standardized achievement testing as a less restrictive alternative. The legisla-

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216. *Id.*

217. Kentucky State Bd. v. Rudasill, 589 S.W.2d 877 (Ky. 1979).

218. KY. CONST. § 5. This freedom of choice in schooling is relatively unusual.

219. 589 S.W.2d 877 (Ky. 1979). The decision of the lower court in this case is noted in Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education*, 67 KY. L.J. 415 (1978-79).

220. 589 S.W.2d at 884.

221. *Id.* at 879. The parties sought a declaratory judgment that Kentucky's school approval requirements were invalid. *Id.*

222. *Id.*

223. *Id.* at 883. Specifically, the state interest was to prepare its citizens to intelligently exercise the franchise. *Id.*

224. *Id.* at 884.

225. *Id.* The state had contended that the teacher certification and textbook approval requirements assured quality. *See id.* at 883. The court agreed with the parents' objections to state-prescribed textbooks because to allow the state the power to determine which texts would be used in private schools "is but to require that the same hay be fed in the field as is fed in the barn." *Id.* at 884. The court thus seemed to object to standardization of schooling—a state requirement that was also rejected in *Pierce*. *See supra* note 74 and accompanying text.

226. 589 S.W.2d at 884.

227. In an unreported decision, the lower court had ruled that the imposition of the state regulations on private religious schools violated the free exercise clause. *See* Comment, *supra* note 219, at 416.

tures of at least two states, possibly aware of the claims that regulation of private religious schools may burden the free exercise of religion, have adopted standardized achievement testing as an alternative to regulation of private education.[228]

Standardized Testing: A Less Restrictive Alternative?

The Kentucky Supreme Court in *Kentucky State Board v. Rudasill*[229] decided that standardized testing was to be used in Kentucky as an alternative to accreditation or regulation of private religious schools. Prior to *Rudasill*, the Kentucky Legislature had passed the Educational Improvement Act[230] which required testing of public school students in certain grades, and detailed reporting and planning by local school districts.[231] The purpose of the statute was to improve instruction in the public schools.[232] If the advocates of "appropriate" standardized testing in *Rudasill*[233] were attempting to expand the scope of the act to include the statewide testing program in the private school setting, the statute clearly is no less restrictive than regulation of the private schools. In fact, it may be more restrictive. If the choices are left to the state regarding which standardized test is to be administered to private school students, the content of the test, the minimum acceptable score, the penalties for not achieving the minimum score, and whether an individual student or school as a whole is to be assessed, then the state control over the private school may be as unacceptable as direct regulation. Furthermore, the court in *Rudasill* implied that test results may be used to determine whether or not the school would be permitted to operate.[234] Thus, if private school students do not "pass" the test, it is possible that the state could close the school.

The purpose of the Kentucky testing statute might not reflect the goals of the individual private religious schools. Assuming that a test could be purchased or developed that measures competencies necessary to fulfill the goals of the statute (such as preparation for post secondary education, or completion of high school) and that those competencies are not necessary to fulfill the goals of the private schools,[235] testing of those competencies would unnecessarily regulate the curriculum and instruction of the private schools. One state has attempted to avoid this problem.

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228. *See* ARIZ. REV. STAT. ANN. §§ 15-802, -815 & -310 (Special Pamphlet 1982); N.C. GEN. STAT. § 115C-549, -550 (Supp. 1981).

229. *See supra* notes 217-28 and accompanying text.

230. KY. REV. STAT. § 158.650 to -.730 (Supp. 1982).

231. *Id.* § 158.710.

232. The stated purpose of the act was "to assure the right of each student in the public schools of this state to acquire knowledge and reference skills essential for completing high school, pursuing a course of study in post secondary education, or entering the work force in our society." *Id.* § 158.660. Reference skills are defined as "library skills of locating and utilizing various sources of information." *Id.* 158.650(6).

233. 589 S.W.2d at 884.

234. "[I]f the results show that one or more private or parochial schools have failed reasonably to accomplish the constitutional purpose [of providing education], the Commonwealth may then withdraw approval and seek to close them for they no longer fulfill the purpose of 'schools.'" *Id.* at 884.

235. See Wisconsin v. Yoder, 406 U.S. 205 (1972) (discussed *supra* notes 87-120 and accompanying text), where the goals of the Amish were antagonistic to the purposes of the Kentucky Act.

North Carolina has enacted a statute that substitutes standardized testing as an alternative to regulation of church schools.[236] The North Carolina statute requires the chief administrator of the school to select the test and to establish a minimum passing score.[237] The test must be a nationally standardized test.[238] Because of this requirement there are problems even with this statute unless the test is selected very carefully.[239]

Nationally standardized tests fall basically into two categories: norm-referenced and criterion-referenced.[240] Norm-referenced tests are reported in terms of averages (norms).[241] This reporting ensures that half of the test-takers will be below average, no matter what their score.[242] Criterion-referenced tests involve the defining of competencies and the writing of test items intended to reflect mastery of those competencies.[243] The items are reported according to the number of correct responses.[244] Whether the test is norm-referenced or criterion-referenced, it must be valid, that is, it must measure what it purports to measure.[245] In all fairness, a test should not measure competencies that were never taught in school.[246]

The relationship of the test content and what is taught in school may be further divided into curricular validity and instructional validity.[247] Curricular validity is a measure of how well the test items represent the objectives of the curriculum.[248] Instructional validity is a measure of whether or not a school's stated objectives were translated into topics actually taught in the school.[249]

In the context of private school regulation, it is curriculum validity which poses the major burden on the private schools. If a test is to be a valid indicator of competencies, it is imperative that the objective of teaching those competencies is contained in the curriculum of the private school. If a private school is unwilling to permit a state to regulate its curriculum and course content, it should be even less willing to permit a national testing agency to dictate curriculum and course content through the items that it tests. Yet that is precisely what would happen if students

236. N.C. GEN. STAT. § 115C-548 to -550 (Supp. 1981).
237. *Id.*
238. *Id.*
239. *See infra* notes 240-53 and accompanying text.
240. McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 670 (1979).
241. McKenna, *What's Wrong with Standardized Testing*? in STANDARDIZED TESTING ISSUES: TEACHER'S PERSPECTIVES 7 (1977) (republished on microfiche by Education Research Information Center, catalog no. ED 146 233).
242. *Id.* In a norm-referenced test, for example, a score might be reported as 76, meaning that the student was in the top quartile of the scores, or that 75% of the students taking the test achieved a lower score. Anderson, *Take This Crash Course on Test Design*, 168 AM. SCH. BD. J. 28, 30 (July 1981).
243. McClung, *supra* note 240, at 669. An example of a criterion-referenced test is a typical state test for a driver's license. In theory, anyone who has the competency necessary to drive a car will pass the test and receive a license.
244. Anderson, *supra* note 242, at 30.
245. McClung, *supra* note 240, at 666.
246. Young, *Legal Aspects of Minimum Competency Testing in the Schools*, 16 LAND & WATER L. REV. 561, 581 (1981).
247. *Id.*
248. *Id.*
249. *Id.* at 581-82.

are required to pass standardized tests that are written by testing companies and nationally normed. If the existence of the private school depends on its students achieving a certain score on a standardized test, will not the school be required to "teach to the test?"

Furthermore, test content may be designed either to measure the mastery of a curriculum or to predict competency in the outside world.[250] For example, a test might purport to measure whether a student can read a fourth grade textbook, or whether he can read the instructions in a voting booth.[251] If standardized testing is used to protect the interest of the state in education, then arguably the test should measure the latter. A state should have no particular interest in ensuring that a person can "read," but rather, its interest should be in ensuring that a citizen can intelligently exercise the franchise.

If the test is to test life skills, the curriculum and instruction should emphasize the transference of learning of school skills to life skills.[252] This is one more burden on the private schools' curriculum and day-to-day instruction. The objective of some schools is to teach for life, and the objective of some is to teach for the "after life."[253] While the interest of the state must be in the former, burdening the curriculum and instruction of private religious schools with tests formulated and normed by national testing agencies without reference to the goals and curriculum of the private school is at least as restrictive an alternative as reasonable state regulation. Until the state and the private schools reach an agreement concerning their common goals in education, the present conflict between the state's interest in education and the role of the private religious schools in meeting the state's interest will not be resolved.

The Reasons for State Regulation of Private Schools

The primary reason for state regulation of any private school should be to protect the state's interest in a minimum education for all of its citizens. In *San Antonio School District v. Rodriguez*,[254] the United States Supreme Court upheld Texas' method of school financing over the contention of some parents that the method discriminated against the poor, and thus denied their children equal educational opportunity. The Court stated that there was no indication that Texas' system failed "to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[255] Thus, if a state is required to provide no more than a minimum education, then arguably it should not be permitted to require the private schools to provide more than that minimum. This min-

250. McClung, *supra* note 240, at 653.

251. The assumption, of course, is that if the student can do the former, he can do the latter. This is not necessarily so. *Id.* at 684.

252. *Id.* at 685.

253. J. COONS & S. SUGARMAN, EDUCATION BY CHOICE 37 (1978).

254. *See* 411 U.S. 1, 25 (1973).

255. *Id.* at 37.

imum seems all that is necessary to protect the state's interest in ensuring that its citizens will be able to participate in a democratic society.

This is not to say that there is not another reason for state approval, or accreditation, of private schools. Such approval or accreditation could provide a standard by which the state might identify superior and inferior schools,[256] so that parents will be better able to make informed choices regarding their children's schooling. The private schools' submission to such approval or accreditation, however, should be voluntary. This is because superiority and inferiority are value judgments reflecting the viewer's assessment of how well a school is fulfilling the viewer's concept of the goals of education. Often there is fundamental disagreement concerning those goals.[257] Conflict over who should make those judgments has been the issue of the private school regulation cases.

That a child should acquire certain basic skills in language, mathematics, physical coordination, social convention, and some basic information about society, seems to be almost universally accepted.[258] To the extent that the fulfillment of these goals by the private schools may be accurately observed and measured, regulation of these schools to ensure that every child acquires these basic skills should also be accepted. To the extent that the goals of education are broader than requiring that children acquire a few basic skills, however, there is not a concensus. The choices regarding schooling beyond what is necessary to protect the state's interest should therefore be left to parents. The power to choose educational goals beyond the minimum necessary to protect the state's interest in an informed electorate should not rest in the hands of political majorities[259] especially when the decision of the majority burdens the right to free exercise of religion.[260]

Even when there is consensus concerning the goals of education, there is often disagreement about the means of attaining them. The establishment of curriculum and the selection of teachers and textbooks requires making value judgments that may be controversial. As with the setting of goals, the issue of who selects the means of fulfilling those goals must be resolved by defining the legitimate interests of the state in education, providing means to protect those interests, and leaving any further educational choices to individual parents.[261]

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256. Elson, *State Regulation of Nonpublic Schools: The Legal Framework* in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 103 (D. Erickson ed. 1969).

257. J. COONS & S. SUGARMAN, *supra* note 253, at 36.

258. *Id.* at 68.

259. Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R. & C.L. L. REV. 309, 324 (1980).

260. If the parent is not to decide whether his child shall be reared to become an Amishman, an orthodox Jew, or a member of a Harvard club, who is? The majority of voters in [any state]? Public educators at state or local levels who have frequently discriminated against minorities, . . . when community pressures demanded it? Legislatures, which have often passed laws condemned by the Supreme Court as travesties on human dignity? Parents are subject to error, but so are emissaries of the state.

Erickson, *Freedom's Two Educational Imperatives: A Proposal* in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 159, 163 (D. Erickson ed. 1969).

261. J. COONS & S. SUGARMAN, *supra* note 253, at 36.

Conclusion

Attempts by states to require private religious schools to submit to state regulation have caused considerable controversy. In determining the extent to which a state may regulate these schools, state courts have applied the three-part test enunciated by the United States Supreme Court in *Wisconsin v. Yoder*. The first part of the test requires a finding that the religious beliefs are sincere or truly held. The second part demands a determination of whether a state requirement burdens the religious belief. If a parent makes the showing required by the first two parts of the test, the court must then balance the interest of the state in its regulation against the first amendment interest of the parent. Under this third part of the test the state's interest must be a strong—perhaps compelling—one for the state regulations to be upheld.

No reported opinion has relied on the third part of the test to uphold state regulation of private religious schools. The cases upholding state regulation have done so because the courts found either that the beliefs of the parents were not religious or that the particular state regulation did not burden those beliefs. It is doubtful that any state interest in education beyond providing the minimum skills necessary to ensure citizen participation in a democratic society could be sufficiently important to warrant burdening the free exercise of religion. Furthermore, it seems clear from the evidence presented in the cases that most of the private religious schools did, in fact, provide sufficient education to their students to meet this state interest.

While it has been conceded in most of the cases that the state does, indeed, have some interest in education, the issue of these cases has been the means by which the state may ensure that its interest is being protected by the private religious schools. The states have attempted to protect their interest by enacting compulsory attendance statutes which require parents to send their children to state-approved schools. The states then, usually be regulation, determine the requirements that a school must meet to obtain approval. It is these regulations which have precipitated the controversies. Often, the regulations set forth goals of education that conflict with the educational goals of the private religious schools.

As an alternative to direct regulation, some advocates for the private religious schools have suggested standardized achievement testing of students. As long as the content of the test reflects the educational goals of both the state and the private religious schools, such testing might be the means whereby the state can monitor the education provided by these schools. If the test measures competencies in addition to those minimums necessary to protect the state's interest, standardized testing may be as intrusive on the private religious schools as is direct regulation.

When the educational goals of the state and the private religious schools coincide, the goals of both may be measured by standardized tests. When the educational goals of the state burden the free exercise of religion

in private religious schools, however, only those means carefully tailored to protect a state's interest in a minimum education for its citizens should be upheld.