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Fundamentalist Christian Educators v. State: An Inevitable Compromise

Neal Devins*

The war between state regulators and religious parents and educators persists. The main battlefield is state regulations governing the education of children at home and in private schools.

On one side, religious parents and educators claim that state-prescribed "minimum standards" and licensing procedures improperly interfere with their religious beliefs. This claim is rooted in the right to religious expression guaranteed by the Free Exercise Clause of the First Amendment¹ and the implied Fourteenth Amendment right of parents to direct their children's upbringing.² Over the past twenty years, this challenge to state authority has been championed principally by Fundamentalist Christian educators³ and parents.⁴

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1. U.S. CONST. amend. I.

2. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); see U.S. CONST. amend XIV.

3. "Fundamentalist Christian educators" refers to evangelical Protestants and their churches. These churches typically are not affiliated with mainstream Protestant denominations. See James C. Carper, *The Christian Day School, in RELIGIOUS SCHOOLING IN AMERICA* 115-18 (James C. Carper & Thomas C. Hunt eds., 1984).

4. See generally James C. Carper & Neal E. Devins, *The State and the Christian Day School, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER* 211 (James E. Wood, Jr. ed., 1985) (exploring the controversy between a state's right to impose reasonable regulations on religious schools and the Fundamentalist Christian day schools' constitutional right to be free from unwanted state regulation); Neal Devins, *A Constitutional Right to Home Instruction?*, 62 WASH. U. L.Q. 435 (1984) (defining the states' boundaries regarding regulation of home education and arguing that although the state may regulate home education, it cannot prohibit it altogether); Patricia M. Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189 (1983) (discussing the home

On the other side, state authorities emphasize their right to impose "reasonable" regulations on religious schools and religious home instruction. State officials assert that these regulations establish minimum criteria to protect children from the adverse consequences of an inadequate education. The state, moreover, claims an independent interest in assisting the child in developing citizenship skills. Schools and parents who do not conform to these regulations violate compulsory school attendance laws and may be subject to criminal prosecution.

From 1975 to 1983, Fundamentalist Christian educators and parents fought a holy war against state officials. Neither side seemed especially interested in accommodating the other and, as a result, lawsuits emerged in most states. Sometimes religious liberty claimants would succeed; most times the state would prevail. But these state victories came at a substantial price. Unwilling to comply with court-approved regulations, religious parents and ministers were jailed, churches were padlocked, and states threatened to terminate parental rights.⁵

Since 1983, this struggle, though far from dormant, has become subdued. Each side seems more accepting of the other. More significantly, the battle has shifted away from adversarial winner-take-all litigation towards legislative reform. Since 1982, thirty-four states have adopted home school statutes or regulations.⁶ Twenty-three of these states, moreover, have repealed teacher certification requirements; only one state—Michigan—still demands that all pupils be taught by a certified teacher.⁷

education movement and examining the constitutional implications of state regulation); Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987) (examining the constitutional implications of state regulation of home education and arguing that for constitutional and other reasons, home education should be discouraged); Cynthia W. West, Comment, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801 (examining the constitutional boundaries within which a state may regulate religious schools and discussing the constitutional and policy implications of legislative deregulation of religious schools).

5. See Neal Devins, *Nebraska and the Future of State Regulation of Christian Schools*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, II, at 107 (Dean M. Kelly ed., 1986); David Moshman, *Faith Christian v. Nebraska: Parent, Child, and Community Rights in the Education Arena*, 86 TCHRS. C. REC. 553 (1985) (discussing the situation surrounding the Faith Christian School).

6. Christopher J. Klicka, *Home Schooling in the United States: A Statutory Analysis* (Aug. 1990) (on file with Author); see also Donald P. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REF. 733, 746-54 (1990) (arguing that a Michigan statute requiring teacher certification for parental home instructors is unconstitutional); HOME SCH. CT. REP., May-June 1991, at 8.

7. In 1983, 24 states demanded that home schools be taught by a certified teacher. See Lines, *supra* note 4, at 227-34. Today, Michigan is the only state that has a teacher certification requirement. See HOME SCH. CT. REP., July-Aug. 1991, at 1; *infra* notes 96-100 and accompanying text.

This Essay will examine the transformation of controversies between Fundamentalist Christian educators and state education officials from court confrontations to political compromise. In examining this shifting landscape, three points will be made. First, litigation is ill-suited to resolve this conflict. The differences between Fundamentalist Christian educators and state officials become more pronounced during litigation, even though both sides share significant common ground.⁸ Court rulings rarely recognize this common ground; instead, courts seem predisposed either to approve or to invalidate all regulations. Making matters worse, judgments are difficult to enforce because the termination of parental rights and other sanctions for noncompliance are too severe to put into effect. Second, the Supreme Court's free-exercise decisions play a rather small role in this field. The state political process, on the other hand, is as a matter of political necessity extraordinarily sensitive to religious liberty concerns. The jailing of dedicated parents and religious officials does not sit well with the electorate, especially when children in Fundamentalist Christian schools and home study programs outperform their public school counterparts. Third, political compromise should not be equated with political abdication. Important state objectives are best served through cooperative measures. State officials, therefore, should not shy away from insisting that in critical areas these Fundamentalist Christian school and home study students measure up to public school standards.

I. *The Failure of the Adversarial Model*

The legal battle between state regulators and religious parents and educators apparently pits intractable foes in a fight to the death. Religious interests, it seems, reject *any* state involvement in their educational ministries.⁹ State actors seem likewise unyielding in their demand that religious educators mimic their public school counterparts.¹⁰ When one examines the legal arguments and rhetorical posturing that surrounds their court battles, however, this caricaturing becomes understandable.

A. *The Interests of the Adversaries*

The source of the confrontation is widespread dissatisfaction among Fundamentalist Christian parents and educators with the state educational establishment. The main reason these Fundamentalist Christian parents opt out of public schools is their perception

8. Cf. Lupu, *supra* note 4, at 987 (noting that Christian parents are unwilling to "submit to a jurisdiction whose very exercise they find constitutionally—and religiously—objectionable").

9. See *id.*; Tom Minnery, *Does David Gibbs Practice Law as Well as He Preaches Church-State Separation?*, CHRISTIANITY TODAY, Apr. 10, 1981, at 48.

10. See STEPHEN ARONS, COMPELLING BELIEF 100-01, 121-22 (1983) (cataloging criticisms of the values public schooling furthers and ideological justifications given in defense of public education).

that the “secularization” of public schools, (attributed to Supreme Court decisions prohibiting organized prayer,¹¹ Bible reading,¹² the teaching of Biblical creation,¹³ and the posting of the Ten Commandments¹⁴ in public schools) denies their right to oversee the upbringing of their children as they see fit. Many Fundamentalist Christian educators also complain of the perceived “breakdown” in public education, associated with lack of discipline, sexual permissiveness, and drug and alcohol abuse.¹⁵ In court, Fundamentalist Christians attack state regulations as being anti-religious and having a poor educational policy. They depict the state education bureaucracy as either insensitive or hostile to the religious mission of these Fundamentalist Christian educators. Unlike Catholic, Jewish, and other religious educators who often embrace teacher certification requirements and other state regulations, Fundamentalist Christian educators and home study proponents have greater difficulty complying with state regulations that seek to make private schools like public schools.¹⁶ Contending that many of these regulations serve no useful educational purpose, Fundamentalist Christians deem state regulatory initiatives as de facto religious harassment. To support their regulatory ineffectiveness contention, Fundamentalist Christian educators and parents point to the fact that their students generally perform as well or better than their public school counterparts on nationally recognized achievement tests.¹⁷

Weighing against these arguments is the state’s paramount interest in the education of its youth. Education is one of the state’s most compelling responsibilities. The state’s interest in education was noted by the great education reformer Horace Mann, who said, “The true business of the schoolroom connects itself, and becomes

11. *Engel v. Vitale*, 370 U.S. 421, 436 (1962).

12. *School Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

13. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

14. *Stone v. Graham*, 449 U.S. 39, 42 (1980).

15. See Carper, *supra* note 3, at 115-18. These reasons typically are cited by non-Christian parents in explaining current dissatisfaction with public schools. See Thomas Toch, *The Exodus*, U.S. NEWS AND WORLD REP., Dec. 9, 1991, at 66-67. The number of students who opt out for religious reasons is inexact. Most estimates suggest that 1,000,000 students attend Christian schools and 300,000 children are taught at home—about 75% of whom are taught by Christian parents. See Carper, *supra* note 3; Toch, *supra*, at 73.

16. See generally Carper, *supra* note 3; Devins, *supra* note 4; Lines, *supra* note 4.

17. See David Guterson, *When Schools Fail Children*, HARPER’S, Nov. 1990, at 58, 59 (contending that home-schooled children tend to score well above average on standardized achievement tests); Alfie Kohn, *Home Schooling*, ATLANTIC, Apr. 1988, at 20, 21, 23 (citing numerous studies concluding that the great majority of home-schooled students score above average on achievement tests); Brian D. Ray, *The Kitchen Classroom*, CHRISTIANITY TODAY, Aug. 12, 1988, at 23-24 (reviewing the growing empirical data supporting the theory that students taught at home score better on standardized tests than those who attend public schools).

identical, with the great interests of society.”¹⁸ In a similar vein, the Supreme Court noted in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁹

Because of the centrality of the state’s interest in ensuring the provision of good education to all youngsters, the state is vested with the authority to establish reasonable regulations governing both public and private schools. Not surprisingly, state education officials are reluctant to subordinate their rulemaking authority and instincts²⁰ to validate the deregulatory agenda of Fundamentalist Christian educators and parents.

B. *The Failure of Judicial Balancing of Interests*

Judicial attempts to resolve this dispute have been truly unsatisfactory. These cases often present courts with an apparently hopeless entanglement of fact, judgment, secular values, and religious conviction. Consequently, court decisions on this issue are often at odds with one another. Some courts approve while others invalidate identical regulatory schemes—all applying the “same” legal standard.²¹ There are also great variances within a state. State and local education officials are inconsistent in their application of often vague regulatory demands²² and are selective in their enforcement of the law.²³

The variability of judicial decisionmaking is apparent in competing judicial perceptions of teacher certification requirements. Courts that rule for the state see themselves as “ill-equipped to act as school boards and determine the need for discrete aspects of a compulsory school education program,”²⁴ and argue “that it *goes without saying* that the State has a compelling interest in the quality

18. 2 THE ANNALS OF AMERICA: GREAT ISSUES IN AMERICAN LIFE 365 (1968) (quoting HORACE MANN, TWELTH ANNUAL REP. OF THE MASS. BD. OF EDUC. (1848)).

19. 347 U.S. 483, 493 (1954).

20. See Eugene Bardach, *Educational Paperwork*, in SCHOOL DAYS, RULE DAYS 124 (David L. Kirp & Donald N. Jensen eds., 1986); Robert A. Kagan, *Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness*, in SCHOOL DAYS, *supra*, at 64.

21. See generally Devins, *supra* note 4 (discussing the judicial rationales for validating various states’ regulatory procedures in the face of constitutional challenges); Lines, *supra* note 4; James W. Tobak & Perry A. Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1 (1982) (surveying the means by which states maintain control over home schooling).

22. See Leah B. Ward, *What Happens When Parents Turn Teachers*, N.Y. TIMES, Jan. 10, 1982, § 13, at 3 (comparing the disparate manners in which two Rhode Island families were treated under that state’s home instruction laws).

23. See *infra* notes 96-110 and accompanying text (discussing home school enforcement in Michigan).

24. *State v. Shaver*, 294 N.W.2d 883, 899-900 (N.D. 1980).

and ability of those who [teach] its young people."²⁵ Courts that side with religious interests appear equally presumptive. They find it "*difficult to imagine . . . a state interest sufficiently substantial to sanction abrogation of [the parent's] liberty to direct the education of their children,*"²⁶ and, though seeing a bachelor's degree as an "indicator" of competency, nonetheless find a bachelor's requirement excessive because "it is not a *sine qua non* the absence of which establishes [incompetency]."²⁷

Vagaries in judicial approaches are a result of many factors. Poor lawyering on the parts of some state prosecutors and attorneys for Fundamentalist Christian educators offers a partial explanation for this judicial failure.²⁸ Varying regulatory schemes are also at issue. More significantly, Supreme Court decisions provide ample support for each side. Parents and schools refer to language in Court rulings that the state cannot "standardize" children by "forcing them to accept instruction from public teachers only,"²⁹ that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations,"³⁰ and that these "additional obligations" include "the inculcation of moral standards, religious beliefs, and elements of good citizenship."³¹ Attorneys for the state, in contrast, refer to Court opinions proclaiming that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation,"³² and recognizing state power "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."³³

*Employment Division v. Smith*³⁴ is not likely to clarify this muddle.

25. *State v. Faith Baptist Church*, 301 N.W.2d 571, 579 (Neb. 1981) (emphasis added).

26. *State v. Whisner*, 351 N.E.2d 750, 771 (Ohio 1976) (emphasis added).

27. *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877, 884 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

28. See James C. Carper, *The Whisner Decision: A Case Study in State Regulation of Christian Day Schools*, 24 J. CHURCH & ST. 281 (1983) (implying that the prosecution did not produce sufficient testimony to support its arguments); Minnery, *supra* note 9 (asserting that a fundamentalist Ohio law firm has lost important cases because of a lack of time and thoroughness by the firm's senior partner). On the importance of good lawyering, see William Bentley Ball, 60 GEO. WASH. L. REV. 809 (1992).

29. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

30. *Id.*

31. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

32. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

33. *Pierce*, 268 U.S. at 534.

34. 494 U.S. 872 (1990).

In holding that “the right to free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),’ ”³⁵ *Smith* apparently limits free exercise protections to instances where religious practice is singled out for differential treatment. Because state regulations governing religious schools and parents extend to nonsectarian schools and parents, *Smith*’s holding presumably extends to government regulation of church-based education ministries. At the same time, *Smith* recognizes that when free exercise claims operate “in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children,”³⁶ heightened judicial scrutiny may well be appropriate. Indeed, pointing to this language, attorneys for religious parents and educators contend that *Smith* ultimately buttresses religious liberty claims against state education officials. Although this argument has yet to succeed,³⁷ *Smith* preserves an uneasy status quo of self-contradictory decisionmaking.

Inconsistent rulings have proved especially destabilizing here. Each side had reason to think that they might secure a complete victory in courts, and thereby became more resolute in their position. Indeed, the absolutist positions stated in adversarial litigation took hold and both sides became more extreme in their positions. Fundamentalist Christian educators and parents increasingly came to view their schools as God’s property. At the urging of the Christian Law Association and other advocacy groups,³⁸ they repudiated state regulatory authority as inconsistent with the New Testament command to “render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.”³⁹ The state also hardened its position. Rather than limit its regulatory authority, some state officials preferred to close churches, and jail ministers and parents.⁴⁰

The adversarial model has also failed because of the high costs of enforcement. When the state loses in court, its regulatory scheme is, of course, without effect. When the state wins in court, however, it faces a dilemma. Religious educators and parents often profess that they would rather go to jail than comply with regulatory demands that violate their religious beliefs. These are not empty threats. In Nebraska and Michigan for example, religious parents have been jailed for refusing to comply with teacher certification requirements.⁴¹ Tremendous pressure is placed on the state through

35. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982)).

36. *Id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

37. *People v. DeJonge*, 470 N.W.2d 433 (Mich. Ct. App. 1991); *Crites v. Smith*, App. No. 01-A-01-9101-CH-00002, 1991 Tenn. App. LEXIS 721 (Tenn. Ct. App. Sept. 4, 1991).

38. See *Minnery*, *supra* note 9, at 49.

39. *Luke* 20:25-26; *Mark* 12:17-18; *Matthew* 22:21-22.

40. See *Devins*, *supra* note 5, at 107.

41. See *id.* at 112-15; *Michigan: Home Schoolers Feel Pressure*, HOME SCH. CT. REP. Mar.-Apr. 1991, at 7-8).

this steadfast resistance. Sanctions such as the padlocking of churches, the jailing of ministers and parents, and the termination of parental rights can be successful only if there is widespread public support. But this support rarely emerges; for whatever wrong Fundamentalist Christian educators might be guilty of, it is a wrong that does not justify such severe sanctions.

Disputes between the state and Fundamentalist Christian educators are ill-suited to judicial resolution. Indeed, resorts to legalism have clearly had a deleterious effect. By discouraging an out-of-court constitutional dialogue between opposing sides, the issue was thrust into an adversarial setting with each side shouting slogans at the other. Worse yet, the conflict was prolonged by inconsistent judicial approaches and generally successful disobedience to pro-state decisions. Along the way, children were harmed. Their lives lacked stability as their parents and the state engaged in open conflict over their hearts and souls. Rather than cooperate to ensure that all children receive a quality education without unduly disrupting parental rights, litigation chilled efforts to find a common ground.⁴²

II. *Politics as Religious Salvation*

Fundamentalist Christian educators and parents often lose in court. In almost all cases, however, religious interests ultimately prevail. How can this be? The answer is that the success of these Fundamentalist Christian educators is not contingent on favorable court rulings. Although regulations may ask too much of private schools and therefore be found unreasonable by courts,⁴³ the state most often suffers political defeats.⁴⁴ In the end, rather than jailing parents and ministers for noncompliance, state officials ultimately back down from High Noon-style showdowns with Fundamentalist Christian educators and parents. This is the lesson of North Carolina, Nebraska, Michigan, and several other states.

42. Litigation, on occasion, prompts political solutions. Consequently, although litigation, standing alone, is insufficient in fashioning appropriate policies, it may help frame subsequent political debates. At the same time, were the state and Christian educators willing to engage in a nonadversarial dialogue, solutions to policy disputes would be reached with less emotional, financial, and educational costs. In cases where nonadversarial dispute resolution proves impossible, litigation cannot be abandoned and may well serve a useful political purpose. For the reasons specified in this Section, however, litigation should be disfavored by both the state and religious educators.

43. See, e.g., *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979); *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976). For an analysis of these decisions, see ARONS, *supra* note 10, at 157-85; Carper, *supra* note 28.

44. See Perry A. Zirkel, *Home Schooling*, 1991 PHI DELTA KAPPAN 408, 409 ("The tendency in recent years has been for the advocates of home schooling to win in the state legislatures, while they have lost in the courts.").

The state political process in North Carolina has been extraordinarily sensitive to the religious liberty concerns of its citizens. On two separate occasions, the state legislature enacted deregulation measures in response to court rulings governing private religious education. When a 1978 state trial court decision approved existing curriculum and teacher certification requirements as “based upon sound educational policy and logic,”⁴⁵ the legislature, in 1979, reacted by specifically exempting church-affiliated schools from most state oversight.⁴⁶ The only obligations placed on religious schools were to keep attendance and disease immunization records,⁴⁷ to comply with building codes,⁴⁸ and to administer a nationally standardized achievement test, to be selected by the school and with no state-prescribed minimum score.⁴⁹ These minimal demands were rooted in the belief that “in matters of education . . . [n]o human authority shall interfere with the rights of conscience or with religious liberty.”⁵⁰ Indeed, the North Carolina legislature went so far as to create a Division of Nonpublic Education to accommodate further religious liberty concerns.⁵¹

This legislative turn-around was a response to “[intense] pressure from Fundamentalist Christian schools and fundamentalists.”⁵² Thousands of fundamentalists voiced support of reforms at hearings at the state capitol and within a year the deregulation measure was approved overwhelmingly.⁵³ This outcome is hardly surprising. North Carolina is a “Bible belt” state with a large and vocal fundamentalist constituency, and the legislature’s responsiveness to fundamentalist issues is due to this relative uniformity of a large segment of the voting population.⁵⁴

The 1979 law, however, proved far from perfect for religious liberty concerns. Home instruction was not mentioned in the law and the state’s attorney general interpreted this omission to mean that home schools were unauthorized.⁵⁵ The legislature “corrected”

45. *State v. Columbus Christian Academy*, No. 78 CVS 1678, slip op. at 14 (N.C. Super. Ct. Sept. 1, 1978), *vacated as moot* (May 4, 1979).

46. 1979 N.C. Sess. Laws 505 (codified at N.C. GEN. STAT. §§ 115C-547 to -554 (1991)).

47. N.C. GEN. STAT. § 115C-548 (1991).

48. *Id.*

49. *Id.* §§ 115C-549 to -550.

50. *Id.* § 115C-547.

51. Telephone Interview with Tim Simmons, Education Reporter, RALEIGH NEWS AND OBSERVER (Oct. 10, 1991) [hereinafter Simmons Interview].

52. David Perkins, *Board Seeks Tighter Rein on Home Schools*, RALEIGH NEWS AND OBSERVER, Apr. 3, 1987, at 10, 20.

53. *Bill Would Require Diploma for Parents Teaching at Home*, RALEIGH NEWS AND OBSERVER, June 17, 1988; Telephone Interview with Charles Nettles, Legislative Vice-President of North Carolinians for Home Education (Oct. 17, 1991) [hereinafter Nettles Interview].

54. Simmons Interview, *supra* note 51.

55. 49 N.C. Att’y Gen. 8-9 (1979).

this interpretation in 1987,⁵⁶ in large part as a response to a decision of the North Carolina Supreme Court.⁵⁷ Only two minimal demands are placed on the content of home study programs by the bill: home instructors must have a high school diploma or equivalent, and home school students must take an annual achievement test.⁵⁸ The law does not require a showing of any particular level of proficiency on the standardized achievement test; it requires no showing of competency on the part of the teacher to teach; it requires no health or safety inspections; and there are no curriculum or minimum attendance requirements, except to operate on a "regular schedule" during at least nine calendar months.⁵⁹

Religious liberty interests, in pushing through this bill, demolished and demoralized the state education bureaucracy. The North Carolina State Board of Education sought to require home study parents to have graduated from college, to adhere to a five and one half hour school day, to comply with expansive curriculum demands, and to demonstrate compliance with these guidelines to local boards of education.⁶⁰ Home schoolers countered these efforts with their own reform package and a successful political strategy. Key legislators, willing to promote the home schoolers' model bill, were also identified. One such legislator was delegate Coy Privette, who argued from two premises: first, that "the basic responsibility for the education of children belongs to the parents,"⁶¹ and, second, that because the public schools in North Carolina "consistently rank 48th or 49th in the nation on standardized tests, the public school process has not in fact been serving the state interests."⁶² Therefore, he concluded, home educators could simply do a better job than the education establishment of protecting public values.⁶³

Home schoolers backed up these arguments with a strong showing of support at legislative committee meetings. "Our tactic was to show up at every committee meeting with three or four hundred home educators. . . . We couldn't speak but they saw our interest and support," said Charles Nettles of North Carolinians for Home

56. 1987 N.C. Sess. Laws 891 (codified at N.C. GEN. STAT. § 115C-563 (1991)); see Perkins, *supra* note 52, at 10, 20; see also Devins, *supra* note 4, at 441; Edward K. Proctor V, Comment, *Delconte v. State: Some Thoughts on Home Education*, 64 N.C. L. REV. 1302, 1314 (1986).

57. *Delconte v. State*, 329 S.E.2d 636 (N.C. 1985) (holding that parent's home school instruction of children met statutory requirement for complying with compulsory school attendance).

58. N.C. GEN. STAT. § 115C-564 (1987).

59. *Id.* §§ 115C-564, -565.

60. See Perkins, *supra* note 52, at 10, 20.

61. Telephone Interview with Coy Privette, Delegate, North Carolina General Assembly (Oct. 17, 1991).

62. *Id.*

63. *Id.*

Education.⁶⁴ “It all turned out so well, because we got so many people to lobby in Raleigh. We wanted the legislators to see what kind of people we really are. We try to do things the right way.”⁶⁵

What made the greatest difference in getting legislation passed was that home educators turned their position into a religious issue. “During the legislative process, home schoolers originally took a straightforward political approach,” noted Tim Simmons of the *Raleigh News and Observer*.⁶⁶ “But this didn’t take them anywhere. However, when the home schoolers added the religious angle, the legislature backed off quickly.”⁶⁷ According to Simmons, “[i]t was this emphasis on religion that became the pivotal issue, and the legislature simply wanted to avoid crossing swords with the Fundamentalists, so religion became the trump card that won the game for home schoolers.”⁶⁸

Religious liberty interests did more than prevail. Their bill was approved ninety-three to zero in the state house;⁶⁹ the state board proposal, in contrast, never made it out of the House Education Committee.⁷⁰ The political power of Fundamentalist Christians combined with the low national ranking of North Carolina public education explains this lopsided victory.

B. Nebraska⁷¹

The forces of reform manifested themselves quite differently in Nebraska. The most controversial battle between the state and Fundamentalist Christian educators centers around a January 1981 Nebraska Supreme Court decision, *State v. Faith Baptist Church*,⁷² involving Pastor Everett Sileven’s unaccredited Faith Christian School. After a three-year struggle with the state, Pastor Sileven—who publicly prayed for God to kill state education officials⁷³—proved the eventual victor. That the state ultimately backed down suggests that the price of enforcing state regulatory schemes may be too great to be practicable.

Events leading up to this widely publicized decision and its aftermath date back to 1977, when Faith Baptist Church of Louisville opened a school without state approval. The leadership of the church maintained that “the operation of the school is simply an extension of the ministry of the church, over which the State of Nebraska has no authority to approve or accredit.” Asserting that the

64. Nettles Interview, *supra* note 53.

65. *Id.*

66. Simmons Interview, *supra* note 51.

67. *Id.*

68. Telephone Interview with Tim Simmons, Education Reporter, RALEIGH NEWS AND OBSERVER (Oct. 17, 1991).

69. *Id.*

70. *Id.*

71. The following description of events in Nebraska is adapted from Devins, *supra* note 5, at 112-15.

72. 301 N.W.2d 571 (Neb.), *appeal dismissed*, 454 U.S. 803 (1981).

73. *World of Religion*, WASH. POST, Feb. 12, 1983, at B6; see DAVID MOSHMAN, CHILDREN, EDUCATION AND THE FIRST AMENDMENT 168 (1989).

state had no "right to inspect God's property," Pastor Sileven and the church officers refused to (1) provide a list of the students enrolled in the school, (2) seek approval for the educational program, (3) employ certified teachers, and (4) seek approval to operate the institution.

The state sought to enjoin the operation of the school because of noncompliance with state regulations. A lower state court ruled in favor of the state. The defendants then appealed to the Nebraska Supreme Court, which focused its attention on the state's compelling interest in education. The court asserted that the state's requirements for teacher certification and curriculum approval were minimal, testing could not protect the state's interest in education, and the state had the power to impose "'reasonable regulations for the control and duration of basic education.'"⁷⁴ In rather terse language it concluded that:

The refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.⁷⁵

The *Faith Baptist* decision, in Sileven's eyes, only meant that his school could no longer lawfully operate in Nebraska. Instead, Sileven operated the school both in an Iowa church and "underground" until he reopened the school at Faith Baptist Church.⁷⁶ Refusing to close the institution because of his religious convictions, he was sentenced in February 1982 to four months in jail for contempt of court.⁷⁷ Sileven was released thirteen days later after promising Judge Raymond Case that he would keep the school closed. Two weeks later, however, the school was reopened.⁷⁸ The game of arrest and release was repeated four times until Sileven eventually completed his four month term in January 1983.⁷⁹ In the meantime, Sileven requested that the Nebraska legislature develop a regulatory scheme acceptable to all parties concerned. A special session ended November 13, without addressing the issue.⁸⁰

When Faith Christian School reopened in the fall of 1982 without

74. *Faith Baptist*, 301 N.W.2d at 577 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

75. *Id.* at 580.

76. Fred Barbash, 'Monday Schools' Invoke Bible and Constitution Against State, WASH. POST, Nov. 27, 1981, at A6, A7.

77. *Sileven v. Tesch*, 326 N.W.2d 850, 851-52 (Neb. 1982) (affirming lower court's order denying Sileven's request for release from incarceration).

78. *Town and Pastor are Angered Foes*, N.Y. TIMES, Dec. 12, 1982, § 1, Part I, at 38.

79. *Minister Freed Again in School Cases*, WASH. POST, Feb. 1, 1983, at A4.

80. *Nebraska Minister Jailed for Defying School Ban*, N.Y. TIMES, Dec. 1, 1982, at A17; see *Nebraska Revises Hiring Rules for Church Schools*, N.Y. TIMES, Aug. 19, 1984, § 1, Part I, at 21.

state approval, Sileven was arrested and returned to jail to complete the contempt-of-court sentence. To prevent continued operation of the school, the state, in October 1982, padlocked the church on weekdays.⁸¹ This action precipitated a protest involving upwards of five hundred people.⁸² The school, however, continued to operate under the supervision of Reverend Jim Lee.⁸³

Amid threats of prosecution, Faith Christian School and as many as twenty-five other “nonapproved” institutions throughout Nebraska operated in 1983.⁸⁴ Efforts at compromise during the fall of 1983 again failed, and in November, six fathers of Faith Christian students were jailed—and remained jailed until February 1984—for refusing to answer a judge’s questions concerning the school.⁸⁵ Their wives and children then fled the state to avoid prosecution.

The succeeding events in the saga of Faith Christian School demonstrate the difficulty a state may have in enforcing its regulatory scheme against resistant Fundamentalist Christian educators. This difficulty received national attention, and ultimately was the subject of federal scrutiny. In early December 1983, the United States Department of Justice (DOJ) considered intervention.⁸⁶ In a similar vein, United States Secretary of Education T.H. Bell suggested that Nebraska’s eligibility for federal education funds would be jeopardized if evangelicals could show that state education officials were practicing religious discrimination in their attempts to close the Faith Christian School.⁸⁷

In addition to federal scrutiny, Nebraska became the subject of national publicity, frequently negative, for its jailing of individuals who acted on the basis of religious conscience. In January 1984, for example, Reverends Jerry Falwell and Jesse Jackson, on separate occasions, visited the Faith Christian School.

Possibly in response to this publicity and possibly just unwilling to keep on jailing Fundamentalist Christian educators, Nebraska Governor Robert Kerrey established a four-member panel to examine and report on the public policy questions surrounding the Christian school issue. On January 26, 1984, the governor’s panel issued its report, concluding, among other things, that “[s]ome accommodation to the First Amendment freedom of religion claims of the Fundamentalist Christian school supporters must be recognized.”⁸⁸ The panel thus recommended that standardized tests could be offered to students in place of teacher certification and curriculum requirements. Parents choosing that procedure would give the State a

81. *Nebraska Baptist School Locked by Court Order*, N.Y. TIMES, Oct. 19, 1982, at A16.

82. Judith Miller, *Fundamentalists Fight Nebraska over School*, N.Y. TIMES, Oct. 22, 1982, at A1. The judge later suspended the padlock order to prevent potential violence.

83. *Disputed School Opens*, N.Y. TIMES, Sept. 16, 1982, at B17.

84. Devins, *supra* note 5, at 113.

85. *In re Contempt of Ralph Liles*, 344 N.W.2d 626 (Neb. 1984).

86. Devins, *supra* note 5, at 113.

87. *Id.*

88. THE REPORT OF THE GOVERNOR’S CHRISTIAN SCHOOL ISSUE PANEL 27 (Jan. 26, 1984) [hereinafter NEBRASKA GOVERNOR’S REPORT] (copy on file with Author).

written statement saying that their religious beliefs dictated their choice and that they consented to testing.⁸⁹

The governor's panel claimed that its recommendations struck "an appropriate balance between the legitimate interest of the State in the education of Nebraska youth and religious freedom."⁹⁰ Yet, when placed in the context of the Nebraska situation, the panel report appears to be no more than a political sellout. The panel ignored its state supreme court decision in *State v. Faith Baptist Church*,⁹¹ as well as its own finding that the state "clearly has an obligation to establish reasonable and effective educational standards and to exercise an appropriate degree of control over all educational efforts."⁹² The panel concluded that "Nebraska teacher certification procedures as presently defined violate the First Amendment free exercise of religious rights of Christian schools."⁹³

The state legislature acted on the panel's recommendations and enacted legislation in April 1984.⁹⁴ The new law does not require schools to provide any information to state officials. Instead, parents who elect to send their children to a school that does not apply for state approval must provide the state with information about the education their children are receiving. Specifically, parents who find existing state regulations in conflict with their religious beliefs can satisfy state compulsory-education laws by submitting an "information statement" that declares that their children attend school for 175 days a year and that they are instructed in core curriculum subjects.⁹⁵

It is noteworthy that the state legislature had earlier failed on several occasions to enact similar measures. Why this change in attitude? One possibility is that the Faith Baptist situation raised the legislators' religious conscience. This possibility, however, does not explain the earlier resistance to similar legislative proposals—including proposals made when Pastor Sileven was in jail and the Faith Baptist Church was padlocked. A second possibility is that the legislators viewed the current state of affairs as a no-win situation. National attention, the jailing of ministers and parents, and possible child custody proceedings certainly would make such a response plausible. A final possibility, as suggested by several state legislators, is that the governor made an agreement with the Nebraska State Education Association to support its educational reform proposal introduced in the previous session in exchange for a promise

89. *Id.* at 22.

90. *Id.* at 1.

91. 301 N.W.2d 571 (Neb.), *appeal dismissed*, 454 U.S. 803 (1981).

92. NEBRASKA GOVERNOR'S REPORT, *supra* note 88, at 21.

93. *Id.* at 3.

94. NEB. REV. STAT. § 79-1701 (1990).

95. *Id.* § 79-1701(2); *id.* § 79-201.

that the Association would not lobby against compromise legislation, as senators said it had in previous years.

Whatever the legislators' motivation, one thing is clear: The state viewed its regulatory scheme as less significant than these various countervailing factors.

C. Michigan

Political accommodations between the state and religious interests are the rule, not the exception. But political settlements are not always reached. Today, Michigan stands alone in demanding teacher certification in home study programs.⁹⁶ Despite vocal protests at the state capitol,⁹⁷ reform proposals are killed before they make their way out of the education committee.⁹⁸ Perhaps a powerful teachers' union explains this resistance;⁹⁹ perhaps Michigan lawmakers have deep-seated convictions concerning professional certification. Whatever the explanation, Michigan exemplifies a political culture generally hostile to religious liberty interests. Furthermore, Michigan courts have decisively rejected challenges to teacher certification and other regulations by Fundamentalist Christian schools and home study programs.¹⁰⁰

Michigan's steadfast commitment to its regulatory regime—reinforced by state court rulings—prompts images of state education officials wielding a big regulatory stick to keep recalcitrant parents and schools in line. Not surprisingly, Michigan is more litigious than other states, with state officials filing at least a dozen truancy or educational neglect petitions against home schoolers each year.¹⁰¹ In many ways, however, Michigan's pro-regulation image is more bark than bite. Rather than several hundred home school parents finding themselves in jail and their parental rights threatened, an uneasy truce has emerged between religious interests and state officials.

Michigan's story is a tale of political compromise through generally lax law enforcement. Michigan home schoolers, knowing that formal compliance with the teacher certification requirement would be fatal to most home study programs,¹⁰² read the law to suit their purposes. According to Dr. Pat Montgomery, a leader in Michigan's home education movement, "[n]owhere in the law does it say you

96. MICH. COMP. LAWS § 388.553 (1991).

97. Chris Parks, *Home School Rally Held*, UPI, Oct. 23, 1985, available in LEXIS, Nexis Library, UPI File.

98. Telephone Interview with Maggie Thelen, Department Specialist, Office of Education and School Law, Michigan Department of Education (Oct. 17, 1991) [hereinafter Thelen Interview].

99. See Parks, *supra* note 97. Strong organizational resistance also may help explain mandatory teacher certification. For example, the National Education Association and National Association of Elementary School Principals flatly oppose home study. See Kohn, *supra* note 17, at 25.

100. See *Sheridan Rd. Baptist Church v. Department of Educ.*, 396 N.W.2d 373 (Mich. 1986) (Christian schools); *People v. DeJonge*, 449 N.W.2d 899 (Mich. Ct. App. 1989) (home study).

101. See *Michigan: Another Round of Wins and Losses*, HOME SCH. CT. REP., May-June 1991, at 8; *Michigan: Litigation Proliferates*, HOME SCH. CT. REP., July-Aug. 1991, at 15.

102. See Dorman, *supra* note 6, at 756-58.

have to have face to face contact with a certified teacher.”¹⁰³ Montgomery therefore encourages Michigan home school families to “interpret the requirement to involve a certified teacher as to their own needs. Some meet with a certified teacher every day, while others merely talk to one on a phone once a year.”¹⁰⁴

The state, for the most part, accepts this subterfuge. According to one state official, once the local school officials are comfortable that the children are being well taught and are receiving an education comparable to their public school counterparts, most local school officials are satisfied and back off from rigid enforcement of the statute.¹⁰⁵ Home education advocates likewise agree that it is this process of compromise at the local level that has been the most successful in convincing officials that home educators do a good job of fulfilling all state interests in educating their children.¹⁰⁶ This process of compromise or accommodation with local level officials is difficult to document, however. Unlike the confrontational approach, which has ample record in court cases and other state publications, the accommodation approach relies on quiet confidence building and is by its nature less publicized. Additionally, one interpretation of this process is that home educators are quietly convincing local school officials to disregard the state law.

Informal compromise is so effective here because, unlike other states, Michigan provides for oversight of all children—whether they attend a public, private, or home school—by district-level officials.¹⁰⁷ Thus, where confrontation with state level agencies has at best produced marginal success in protecting parental rights and religious liberties, compromise and accommodation at the local level seems to have been considerably more effective.

It is this atmosphere of local accommodation that has made home education in Michigan a potentially realistic alternative for families with strong religious motivations. Most home educators accept the statutory status quo because, as the situation now stands, even though there is considerable political tension at the state government level, the “wink” home educators receive from local officials who are much more sensitive to local needs leaves them feeling relatively free to operate.¹⁰⁸ Indeed, home schoolers generally report

103. Telephone Interview with Dr. Pat Montgomery, Founder & Chief Administrator, Clontara School (Oct. 21, 1991) [hereinafter Montgomery Interview].

104. Thelen Interview, *supra* note 98.

105. *See id.*

106. *See* Telephone Interview with David Kallman, Michigan Home School Attorney (Oct. 17, 1991) [hereinafter Kallman Interview]; Montgomery Interview, *supra* note 103; Thelen Interview, *supra* note 98.

107. *See* MICH. COMP. LAWS §§ 388.551, .553 (1991).

108. *See* Kallman Interview, *supra* note 106.

that they are not anxious to seek changes in the law.¹⁰⁹ They fear that opening the issue up for too much discussion could have negative repercussions.¹¹⁰

Right they are. Whereas North Carolina legislators embrace fundamentalist causes¹¹¹ and Nebraska legislators see deregulation as the lesser of two evils,¹¹² powerful teacher unions in Michigan are likely to preserve state-prescribed credentialism. Despite divergent approaches, however, in all three instances a political solution emerged. That two are open and the other clandestine, though significant, does not undercut the ultimate triumph of politics.

D. Conclusion

The explicit and implicit compromises reached in North Carolina, Nebraska, and Michigan are not unusual. On the question of state regulation of Fundamentalist Christian schools, several states—including Alabama, Arizona, Pennsylvania, Vermont, and West Virginia—have joined Nebraska and North Carolina in exempting religious schools from licensing, teacher certification, and curriculum requirements.¹¹³ Other states—including Colorado and Iowa—have reached administrative compromises.¹¹⁴ Finally, some states—including Kentucky, Maine and Ohio—have failed to respond to court decisions striking down state laws and procedures.¹¹⁵ Changes in state laws governing home schooling are far more dramatic. In the past decade, thirty-two states have moderated or repealed home study regulations.¹¹⁶ Sometimes, as in North Carolina, these reforms are a response to court rulings;¹¹⁷ sometimes, they are a result of grass-roots political pressure. Whatever the explanation, religious interests typically prevail in the legislative arena.

III. Cooperation, Not Capitulation

State concessions to Fundamentalist Christian educators and parents are inevitable. For the most part, concessions also make good sense. At the same time, the state should not abandon those students who either attend religious schools or study at home with religious parents. Instead, the state must demand that religious educators advance a limited number of public values.

109. Montgomery Interview, *supra* note 103.

110. *Id.*

111. See *supra* notes 45-54, 66-70 and accompanying text.

112. See *supra* notes 88-95 and accompanying text.

113. See Carper & Devins, *supra* note 4, at 215.

114. See *id.*

115. See Devins, *supra* note 5, at 118. These states perceived that it was better to leave the Christian day school issue dormant rather than prompt further controversy through the promulgation of a new regulatory scheme.

116. See *supra* note 6.

117. See *supra* notes 56-57 and accompanying text. Kansas and Arkansas, for example, enacted home school reform in response to court decisions. See Note, *Home Education v. Compulsory Attendance Laws: Whose Kids are they Anyway?*, 24 WASHBURN L.J. 274, 292-96 (1985) (discussing Kansas reforms); *House Adopts Home Education Bill*, UPI, Feb. 28, 1985, available in LEXIS, Nexis Library, UPI File (discussing Arkansas).

A. *Why Political Compromise Is Inevitable*

The state bears a great cost when it engages in open confrontation with Fundamentalist Christian educators. The chief problem is one of enforceable sanctions.¹¹⁸ Under its *parens patriae* power, the state can, on occasion, assume custody of a child when such action is in the child's best interest.¹¹⁹ For example, the state may exercise this power in the face of parental neglect. According to Professor Sanford Katz, neglect statutes "in many respects, incorporate a community's view of parenthood. Essentially, they are pronouncements of unacceptable child-rearing practices."¹²⁰ While the state most frequently exercises its *parens patriae* power to prevent physical abuse and neglect of children,¹²¹ the state also has authority under this power to enforce truancy statutes.¹²² Fundamentalist Christian educators have been willing to push the state to this extreme.

For many reasons, however, states do not want to reach this degree of confrontation. The closing of churches, the jailing of individuals for practicing their religion, and the displacement of children demand a compelling justification. With Fundamentalist Christian school and home study students outperforming their public school counterparts,¹²³ and with increasing public awareness of problems with public school education,¹²⁴ the state cannot offer a compelling justification for its enforcement actions. Moreover, with public attention focused on public schools, it is politically counterproductive for the state to expend scarce educational resources on

118. See Kagan, *supra* note 20 (discussing analogous problem of fund termination sanction as being too severe to be effectively utilized); *supra* notes 74-93 and accompanying text (discussing Nebraska's experience in trying to enforce sanctions against Christian educators).

119. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (stating that if minimal due process standards are met, parents can commit their child to a state mental hospital if it is in his or her "best interests").

120. SANFORD N. KATZ, *WHEN PARENTS FAIL* 57 (1971).

121. See, e.g., *Hernandez v. State*, 530 P.2d 389 (Ariz. Ct. App. 1975) (terminating parental rights upon a finding of abuse); *In re S.G.*, 581 A.2d 771, 781 (D.C. 1990) (awarding custody to maternal grandmother upon finding sexual abuse by stepfather and a failure of the mother to stop the abuse).

122. See, e.g., *In re James D.*, 741 P.2d 161, 166-67 (Cal. 1987) (upholding truancy statute as constitutionally justified by the legitimate governmental interest in compulsory education), *cert. denied*, 485 U.S. 959 (1988); *State v. Buckner*, 472 So. 2d 1228, 1229-30 (Fla. Dist. Ct. App. 1985) (holding truancy statute to not be unconstitutionally vague).

123. On the virtues of private schools, see JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 67 (1990); JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982); see also *supra* note 17.

124. On problems in public education, see CHESTER E. FINN, JR., *WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE* (1991); NAT'L COMM'N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE OF EDUCATIONAL REFORM* (1983); Diane Ravitch, *U.S. Schools: The Bad News is Right*, WASH. POST, Nov. 17, 1991, at C7.

the enforcement of controversial private school regulations.¹²⁵

Deregulation of religious education—or nonenforcement of regulations—seems a sensible political solution. Confrontations between the state and Fundamentalist Christian educators are politically divisive, are the focus of national attention, and, if carried to their logical extreme, ultimately may force the state to jail parents and ministers and seek custody of children. Additionally, if the state feels compelled to reverse its previous policies, it may appear weak, and its interest in education will be subject to challenge. The best political course is to strike a balance favoring religious liberty and parental rights. Massive legislative reform of both home instruction and church-affiliated schools bears this out.

B. Why Cooperation Is Sound Educational Policy

Noncooperation has failed; therefore, cooperation must be better. Put another way: state educational officials are likely to exert more influence by favoring cooperative strategies over adversarial ones. The National Association of State Boards of Education, for example, has suggested that “[p]ublic educators cannot avoid the issue of home schooling. . . . When public educators work cooperatively with home schooling parents they can enhance understanding and strengthen community ties.”¹²⁶ Specifically, cooperation may make parents more willing to submit to state evaluation, thereby enabling the state to help parents become better teachers.¹²⁷ As former United States Department of Education official Patricia Lines observed, states should “work to build bridges Given a more favorable legal and political environment, it becomes possible to develop positive public/private educational efforts.”¹²⁸

Cooperation is also necessary to protect children. Home school and Fundamentalist Christian day school students might experience frequent disruptions in their education if the state vigorously enforced its regulatory scheme. In Nebraska, for example, children attending the Faith Christian School had to contend with both being taught in another state and not being taught at all.¹²⁹ Obviously, this type of sporadic education harms children. Considering that the primary aim of compulsory schooling is the education of youth, the state should focus its attention on those children whose lives are most affected by its actions.

Cooperation is not simply a way to stave off the costs of enforcement. It makes sense because religious educators are not the enemy; instead, they are dedicated parents trying to do right by their

125. Telephone Interview with Virginia Roach, Project Director, National Association of State Boards of Education (Nov. 15, 1991) [hereinafter Roach Interview].

126. NATIONAL ASS'N OF STATE BDS. OF EDUC., HOME SCHOOLING, July 1988, at 2 (copy on file with Author).

127. Virginia Roach, *Home Schooling in Times of Educational Reform*, EDUC. DIG., Feb. 1989, at 58, 61.

128. Patricia M. Lines, *An Overview of Home Instruction*, 1987 PHI DELTA KAPPAN 510, 516.

129. See *supra* notes 74-82 and accompanying text.

children. Parents do not teach their children at home or send them to religious schools because they are unconcerned. To the contrary, religious schools and home study programs exemplify the type of parent-child-school relationship that should be encouraged by the state. It should come as no surprise that children in these schools outperform their public school counterparts on nationally recognized achievement tests.¹³⁰

State cooperation, finally, makes sense because it respects the rights of dissenting families to avoid state-prescribed socialization without calling into question the right of school authorities to inculcate community-selected values in public schools.¹³¹ Correlatively, there is a legitimate parental interest in "living one's life through one's children, [which] might be called the parent's right to exercise his religion *through* the child, and to extend *through* the child ideas, language, and customs which the parent believes to be important."¹³² Cooperation then is not simply the lesser of two evils. Pluralism, religious liberty, and educational achievement all support cooperative strategies.

C. *The Limits of Cooperation*

Cooperation does not mean abdication. Some states, however, have elected to avoid conflicts with dissenting religious parents and educators by scrapping all meaningful regulations. In these states, students need not demonstrate proficiency in core subject areas. Instead, they need only take a standardized achievement test.¹³³ But to mandate test-taking without mandating a minimum passing score is to substitute the state's critical interest in the education of its youth with a symbolic fig leaf.

This abdication of responsibility is as dangerous as it is irresponsible. The challenge for lawmakers and regulators, as recognized by the National Association of State Boards of Education, is "to meet their obligations to assure all children receive a quality education

130. See COLEMAN ET AL., *supra* note 123, at 124-31, 176 (finding that private school students outperform public school students on standardized achievement tests); see also *supra* note 17.

131. See Michael A. Rebell, *Values Inculcation and the Schools: The Need for a New Pierce Compromise*, in PUBLIC VALUES, PRIVATE SCHOOLS 37-38, 52-53 (Neal Devins ed., 1989) (describing the dilemma and proposing a voucher scheme based on cooperation to solve it).

132. John H. Garvey, *Child, Parent, State, and the Due Process Clause*, 51 S. CAL. L. REV. 769, 806 (1978).

133. See LA. REV. STAT. ANN. § 17:236.1(D) (West Supp. 1991); *supra* notes 46-50, 58-59, and accompanying text (discussing North Carolina); see also Frances F. Marcus, *As Busing Begins in Schools, Louisiana Clears Way for Teaching in Homes*, N.Y. TIMES, Sept. 25, 1981, at A14 (describing the lax system in Louisiana and the possible harm to students).

while considering the relative rights of parents to educate their children.”¹³⁴ This challenge cannot be ignored. At the most practical level, many students participating in home study programs and attending Fundamentalist Christian schools will later be “absorbed” into public school systems.¹³⁵ More significant, the state’s interest in the well-being of its children as well as its own well-being demands that these children not be discounted.

Education is a public good of fundamental importance. “It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹³⁶ Education, under this formulation, is too important to allow private schools to be freed from public school concerns.

But what are these concerns? Clearly, private schools can be required to offer competent instruction in reading, writing, and arithmetic. Private schools also can be made to conform to the *Brown* mandate of racially nondiscriminatory admissions.¹³⁷ These conclusions, however, tell us very little. The conflict between the fundamentalists and the regulators is not about the need for competent instruction; instead, the conflict concerns the *definition* of competency.

This problem is intractable, and I offer no magical solution. It is my opinion, however, that private schools should never be held more accountable for attaining the goals of compulsory education than are public schools. In short, if students in Fundamentalist Christian academies or home study programs test as well as their public school counterparts, the state cannot demand that such schools significantly change their methods of instruction. At the same time, the state can demand that teachers have at least a high school education (or pass an equivalency test), that students are regularly tested, and that religious educators be placed under increased scrutiny when their students are not making adequate progress.¹³⁸

From the standpoint of private and home schools, this formulation seems satisfactory, at least at present. Unless there is a considerable change in the educational outcomes of public school students, private schools and home study programs should be able to match these outcomes without altering their preferred methodology.¹³⁹ Furthermore, compliance with simple nondiscrimination

134. NATIONAL ASS'N OF STATE BDS. OF EDUC., *supra* note 126, at 1.

135. *Id.* at 2; Roach Interview, *supra* note 125.

136. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

137. This is what the Supreme Court held in *Runyon v. McCrary*, 427 U.S. 160 (1976), a case involving a nonsector commercial private school. *Bob Jones University v. United States*, 461 U.S. 574 (1983), suggests that *Runyon* applies to religious schools.

138. The National Association of State Boards of Education has suggested—but not formally endorsed—these and other regulatory initiatives. See NATIONAL ASS'N OF STATE BDS. OF EDUC., *supra* note 126, at 9-10.

139. There is good reason to think that the educational outcomes of private schools will be higher than those of public schools. John Chubb and Terry Moe, for example, argue that private schools—unlike public schools—operate within a “market setting

places few burdens on private schools—even those religious schools that believe in the separation of the races. Under current standards, the only absolute limitation on such a school is the requirement of racially nondiscriminatory admissions.¹⁴⁰

Were public school standards to change, however, private and home schools might be asked to bear a greater burden. This prospect is troublesome, for it may interfere with parental prerogatives in education. Were public schools to truly change for the better, however, it is nonetheless appropriate that expectations of private and home schools also rise. In other words, a ceiling on appropriate state demands must always be relativistic. We cannot lose sight of the fact that what it takes to educate youth for citizenship must always be our ceiling and our floor.

IV. Conclusion

The devolution of state governance over religious education should inform both individual rights interests and state officials. With *Smith* and other Rehnquist Court rulings increasingly speaking of the need to defer to government,¹⁴¹ special interests are beginning to turn away from the courts and towards elected government.¹⁴² “What may be new,” as Professor Paul Weber observed, “is the idea that this comes to be seen as a political necessity, a ‘price’ of having one’s interests protected, of being responsible citizens in a democracy.”¹⁴³

This renaissance of populist reform undoubtedly makes a lot of sense. But populist reform—at least with respect to religious liberty issues—has always made a lot of sense. Before *Smith*, the judiciary’s free exercise record was at best mixed.¹⁴⁴ Thus, religious liberty

[where] . . . there are strong forces at work—arising from the technical, administrative, and consumer-satisfaction requirements of organizational success—that promote school autonomy.” CHUBB & MOE, *supra* note 123, at 37. For a critique of Chubb and Moe, see James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259 (1991).

140. See *Bob Jones Univ.*, 461 U.S. at 575; *Runyon*, 427 U.S. at 178-79.

141. *Smith*, for example, is not the only decision to uphold “a neutral law of general applicability” irrespective of its impact on constitutionally protected freedoms. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). In *Cohen v. Cowles Media Co.*, the Rehnquist Court likewise upheld “a law of general applicability” irrespective of its impact on the First Amendment freedom of the press. 111 S. Ct. 2513, 2518 (1991).

142. The National Abortion Rights Action League, for example, recently informed its membership that “[c]learly Congress is our Court of Last Resort. All hope of protecting our constitutional right to choose depends upon our elected representatives” NARAL SUPREME COURT ALERT (June 27, 1991) (quoted in LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (1992)).

143. Paul J. Weber, *Religious Accountability: Maximalist Positions*, (unpublished manuscript, on file with *The George Washington Law Review*) (1992).

144. Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the Free Exercise Clause prohibited the state from forcing Amish children to attend school); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a regulation denying unemployment benefits to an individual who refused to work on Saturdays on religious grounds violated the

interests generally have fared at least as well before elected officials than appointed judges. Ironically, *Smith* may be a boon to religious liberty. By prompting religious liberty interests to focus reform efforts before the elected government, the reform efforts may prove more successful. The proven success of religious educators in accomplishing their objectives through politics, not the courts, bears this out.

State officials can also learn from their experiences with religious educators. The state cannot be satisfied with court victories, populist religious reformers will place great pressure on government to reform burdensome legislation and regulation. Rather than engage in often counterproductive adversarial battles, the state should engage in constructive constitutional dialogues with religious liberty interests. These dialogues should seek compromise solutions that preserve legitimate state interests without unduly burdening religious liberty. At the same time, states must be careful not to concede necessary interests simply to avoid unpleasant conflicts, as some states unfortunately did in an effort to appease Fundamentalist Christian educators.¹⁴⁵

Whether religious interests and state officials will increasingly forge cooperative arrangements remains to be seen. Both sides should; constructive cooperation makes better policy than adversarial litigation. That is the lesson of the battle between the state and Fundamentalist Christian educators.

Free Exercise Clause); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that the government may not compel affirmation of religious belief) with *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that government may make internal use of an individual's social security number over a religion-based claim); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that an Orthodox Jew may not wear a yarmulke while on military duty); *United States v. Lee*, 455 U.S. 252 (1982) (holding that religious belief prohibiting participation in government did not require exemption from social security tax); *Gillette v. United States*, 401 U.S. 437 (1971) (holding that the Selective Service System did not violate the Free Exercise Clause by conscripting individuals religiously opposed to war); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (holding that the burden on Orthodox Jews to comply with a law prohibiting conducting business on Sunday was indirect). For commentary on the judiciary's record, see Ira C. Lupu, *When Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) (describing courts' reluctance to find that government practices actually burden religious exercise); Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217 (tracing the free exercise doctrine standard through the 1972 case of *Wisconsin v. Yoder* and pointing out the need for further refinement of the balancing test established by the Supreme Court).

145. See *supra* note 133 and accompanying text.