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State Regulation of Religious Education

Controversies between state education officials and religious parents began with the establishment of public schools and continue today. Early battles concerned states' authority to outlaw private schooling altogether; contemporary skirmishes center on whether and how state regulations governing teacher certification, the curriculum, and
the like apply to religious parents and schools.

The right of parents to send their children to private schools was established in *Pierce v. Society of Sisters* (1925). At issue in *Pierce* was an Oregon law outlawing private education. Sponsored by the Ku Klux Klan and rooted in religious hatred, the Oregon law was designed to impose Protestant values on Catholic schoolchildren. In *Pierce* the Court ruled that the state could not outlaw private schooling and that the Oregon statute would cause a state-imposed standardization that is contrary to the fundamental theory of liberty on which American government is based. For the Court, “[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.”

*Pierce*, although critically important to religious educators, was rooted in Fourteenth Amendment Due Process protections and not First Amendment religious liberty rights. That the First Amendment provides additional protections for religious parents was explicitly recognized in *Wisconsin v. Yoder* (1972), in which the Supreme Court held that the state’s interest in compulsory education was not of sufficient magnitude to override a parent’s interest in having her child exempted from public school for religious reasons. Although the Court in *Yoder* recognized the legitimacy of a state’s interest in mandating compulsory education, it upheld the claims of members of the Old Order Amish Faith, who sought to exempt their children from high school attendance. First, the Court emphasized the diluted state interest in educating 14- and 15-year-old children who were socially acculturated and possessed basic reading, writing, and computation skills. Second, the Court accepted the proposition that the early teenage years were crucial in determining whether a child would remain part of the Old Order Amish Faith, which therefore elevated the parents’ interest in removing their children from public school.

The exemption granted the Amish in *Yoder* should not be construed as an unlimited license for parents to control the education of their children. At the outset, the Court noted: “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regu-

lations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a state.” The Court, therefore, would not have permitted the removal of Amish children if they were too young to have acquired basic academic skills. In addition, the Court stressed the self-contained nature of the Amish community. Apparently, the Court would not have exempted the children in *Yoder* from public school attendance if they seemed likely to become members of mainstream society. Finally, the Court suggested that it would not accord a similar right to parents who wished to remove their child from school for nonreligious reasons. The Court emphasized that “[the compulsory attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.”

The reaches and limits of *Pierce* and *Yoder* have been tested through a series of challenges by Christian educators to state laws governing private schools and home instruction. With the Supreme Court declining to resolve this dispute, the battle between education officials and religious parents takes place before state courts and legislators.

This 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. State actors seem likewise unyielding in their demand that religious educators mimic their public school counterparts.

The source of the confrontation is widespread dissatisfaction both among fundamentalist Christian parents and within the state educational establishment. The main reason that fundamentalist Christian parents opt out of public schools is their perception that the schools’ “secularization” (attributed to Supreme Court decisions prohibiting organized prayer, Bible reading, the teaching of biblical creationism, and the display of the Ten Commandments in classrooms) 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, which they associate with lack of discipline, sexual permissiveness, and drug and alcohol abuse.

In court, fundamentalist Christians attack state regulations as being antireligious
and poor educational policy. They depict the state education bureaucracy as either insensitive or hostile to the religious mission of 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. With respect to teacher certification requirements, for example, fundamentalist educators sometimes claim that the inculcation of secular norms through state certification procedures are inconsistent with their religious beliefs. Furthermore, contending that many such regulations serve no useful educational purpose, fundamentalist Christians deem state regulatory initiatives as de facto religious harassment. To support their contention of regulatory ineffectiveness, fundamentalist Christian educators and parents point to the fact that their students generally perform as well as or better than their public school counterparts on nationally recognized achievement tests.

Weighing against these arguments is the state’s paramount, compelling interest in the education of its youth, which was recognized by the Supreme Court in Brown v. Board of Education of Topeka (1954): “[E]ducation is perhaps the most important function of state and local governments.” Not surprisingly, state education officials are reluctant to subordinate their rule-making authority and instincts to validate the deregulatory agenda of fundamentalist Christian educators and parents. The dispute between state educators and religious parents is further complicated by the extraordinary variety of regulatory regimes available to state lawmakers and regulators.

State legislators have enacted, to varying degrees, regulations that require private sectarian schools to satisfy minimal standards in the following areas: fire, health, and safety; the curriculum; textbook selection; instructional time; teacher certification; zoning; consumer protection; student reporting; testing; state licensing; community interaction; and guidance services. The most controversial of these regulations are programmatic ones that govern actual teaching practices in nonpublic schools, including the curriculum, textbook selection, and teacher certification. States contend that such regulations are necessary to ensure that all students attain certain minimal educational standards that are necessary for the welfare of the child and society.

Regulation of home education likewise is extremely varied among the states. At one extreme, some states allow parents to teach their children at home with minimal supervision. Parents need only provide the state board of education with a proposed home study program and administer a standardized achievement test at the end of each school year. At the other extreme, some states impose curriculum and teacher approval requirements. Furthermore, it is often difficult to ascertain what parents must do to have a home study program approved by the state or local education authority. The primary reason for this confusion is that twenty-one states allow home instruction by permitting “equivalent” or “comparable” instruction outside of schools. As might be expected, the determination of equivalency varies considerably from state to state and from district to district within a state.

The Supreme Court, which has not yet decided a dispute concerning state regulation of home instruction or Christian schooling, has provided limited guidance about states’ authority in this area. Currently, the Supreme Court explicitly recognizes the constitutionality of reasonable state regulations of private schools that promote a compelling state interest in education. In Board of Education v. Allen (1968), for example, the Court observed that “[s]ince Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction.” In other words, because the state cannot abolish parochial schools, it must satisfy its secular interests in education via private schools. Therefore, the state must have the authority to regulate the secular educational function of private and home schools. Numerous other Supreme Court decisions have recognized the rights of a state to impose reasonable regulations on private schools. But the Supreme Court has yet to determine where it should draw the line between reasonable and unreasonable state regulations.

Needless to say, state officials and religious educators subscribe to quite different
theories of what regulations are “reasonable,” and judicial attempts to resolve this dispute have been truly unsatisfactory. Such cases often present courts with an apparently hopeless entanglement of fact, judgment, secular values, and religious conviction; as a result, court decisions are often at odds with one another. Some courts approve and others invalidate identical regulatory schemes. There are also great variances within a state. State and local education officials are inconsistent in applying the often vague regulatory demands, and they are selective in enforcing the law.

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”; they argue “that it goes without saying that the State has a compelling interest in the quality and ability of those who [teach] its young people” (State v. Shauer [N.D., 1980], State v. Faith Baptist Church [Neb., 1981]). 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,” and, although seeing a bachelor’s degree as an “indicator” of competency, they nonetheless find a bachelor’s requirement excessive because “it is not a sine qua non the absence of which establishes [incompetency]” (State v. Whismer [Ohio, 1976], Kentucky State Board v. Rudasill [Ky., 1980]).

Vagaries in judicial approaches are a result of many factors. Poor lawyering by some state prosecutors and by some attorneys for fundamentalist Christian educators offers a partial explanation for this judicial failure. Varying regulatory schemes are also at issue. More significantly, Supreme Court decisions provide ample support for each side.

Disputes between the state and fundamentalist Christian educators are ill suited to judicial resolution. These days, it is doubtful that any child may reasonably be expected to succeed in life if denied the opportunity for an education. 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. The state, however, bears a great cost when it engages in open confrontation with fundamentalist Christian educators. The chief problem is one of enforceable sanctions. Under its parens patriae power, the state can, on occasion, assume custody of a child if that is in the child’s best interest. For example, the state may exercise this power in the face of parental neglect. While the state most frequently exercises its parens patriae power to prevent physical abuse and neglect of children, the state also has authority under this power to enforce truancy statutes.

Fundamentalist Christian educators have been willing to push the state to this extreme. Yet, for many reasons, 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, and with increasing public awareness of problems with public school education, 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 the enforcement of controversial private school and home study regulations.

Deregulation of religious education—or nonenforcement of regulations—seems a sensible political solution. Confrontations between the state and fundamentalist Christian educators are politically divisive, 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. In many instances, the most expedient 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. 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. But to mandate test
taking without mandating a minimal passing score is to substitute the state's critical interest in the education of its youth with a symbolic fig leaf.

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 while considering the relative rights of parents to educate their children." 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. 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.

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