FUNDAMENTAL LEGAL CONCEPTS FOR THE CHRISTIAN SCHOOL

by

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Christian schools cannot isolate themselves from their civil obligations. Their governing boards, administrators, and staffs are bound by the laws of the land and they may not ignore, refuse to obey, or refuse to conform to the established laws of community, state, or nation. Those in positions of responsibility in Christian schools should be aware of the laws affecting the operation of their schools and should make every effort to comply with those laws. This paper is devoted to an analysis of specific aspects of law affecting Christian schools. Further, it deals with case law rather than legislative acts. Through the study of court decisions, it may be possible to find some degree of future guidance as to the effective legal administration of Christian schools.

The first area covered is that of the state's jurisdiction over Christian schools. The state does not have unlimited authority over these private schools. Parents also have the right to direct the education of their children. They may choose the curriculum and engage instructors to teach their children. The state may not force school age children to attend only public schools. The right of parents to educate their children in Christian schools is an extention of their First Amendment right of free exercise of religion, which may not be infringed upon by the state.

Due process as prescribed by the Fourteenth Amendment does not currently apply to the Christian school. This amendment is designed to be a protection against government--not private--action. However, under the public function doctrine, the potential for future Fourteenth Amendment application in private education becomes a reality. The public function doctrine states that the more a private organization opens its doors to public service, the more its rights must become subservient to public rights.

The issue of public aid for sectarian education is a question of interpretation. How strictly the Supreme Court at a given time interprets the meaning and intent of the First Amendment is the determining factor.

The last area covered is closely linked with the issue of public financing of nonpublic education. There are those who would deny tax exemption to sectarian education because in their estimation it constitutes indirect public aid. As yet, this issue has not come before the courts for review. However, the IRS has been used as an instrument to force the will of government upon private schools in the area of desegregation.

In essence, each area covered in this paper may be summed up in one terse statement--the courts must decide.

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CHAPTER 1

PURPOSE

Introduction

> Today, education is perhaps the most important function of the 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. It is required in the performance of our most basic public responsibilities, even service in the armed forces. 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. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[1]

Thus spoke the United States Supreme Court in 1954.

Unlike most of the nations of the world, the United States, under the Constitution, provides for no direct control or authority over education. The Tenth Amendment provides that any powers not delegated to the federal government by the Constitution are to be reserved to the states or the people.

At the time of the framing of our Constitution, our system of education in this country was essentially the same as that which had been established by the early settlers of America. These settlers brought with them from Europe a number of ideas about education which they had incorporated into their way of life. In New England, in particular, was felt the influence of the Reformation, which demanded that

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[1]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

an educated clergy proclaim Christian standards of conduct and a literate populace receive these principles. In the aristocratic South, the dominant influence was the humanist tradition of the Renaissance which endorsed education as an end in itself and glorified man by focusing upon the learning of classical languages and letters.

Influenced by these philosophies, the American colonists sought to incorporate and adapt these ideas into a school system that would provide adequate education for their children in the frontier society in which they lived. However, frontier conditions offered little time for the development of intellectual interests. The immediate need was for practical know-how since survival was the main task of life. Yet, because education was considered a necessity, schools were rapidly established. In these colonial schools, education was narrow in scope and meager in content when compared to today's standards. The major purpose of these schools was to provide for religious instruction and afford a casual acquaintance with reading, writing, and arithmetic. Most colonial American communities held a number of religious and other important beliefs in common, and the community schools tended to reflect these beliefs. The school, however, did not provide the total education of colonial children. They received most of their education at home, at work, in church, and from the community at large.

As society became more complex and less dominated by frontier conditions, the emphasis upon tradition and religious orthodoxy came under question. Because a more stable society existed, men tended to view education as a means of providing a posterity which was more self-reliant, and looked to themselves and the future rather than to the past

for their aims and materials. Others no longer saw a necessity for a literate citizenry for the sole purpose of understanding and spreading religious standards of conduct, but saw them also as the cornerstone of freedom and happiness. The education of the common man became the protecting bulwark against the evils of tyranny and despotism. Still, at the time of the American Revolution, the establishment of the Articles of Confederation, and the ratification of the Constitution, the dominant motive for education was that of providing religious instruction. As Francis Schaeffer succinctly put it, "To whatever degree a society allows the teaching of the Bible to bring forth its natural conclusions, it is able to have form and freedom in society and government."[2]

It was the Industrial Revolution which not only brought revolution to the nation's economic system but also a revolution to the entire cultural base of American society, specifically, to the educational process. Employers began to see educated employees as more productive and therefore more desirable. Consequently, they encouraged education. The community as a whole was interested in an adequate education that would develop productive members of society, promote the general welfare, and eliminate the noneducated as a burden on society. Education became the panacea for all problems. As a result, the schools were expected to accomplish the impossible.

Following the mind set of the industrial era society, Horace Mann was able to initiate the concept of free public education. During the 1830s, various states began to form tax-supported, state-controlled

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[2]Francis A. Schaeffer, How Should We Then Live (Old Tappan: Fleming H. Revell Co., 1976), p. 110.

non-sectarian school systems. As politics and society became more democratic, so did the schools. The guiding principle was that every child in the United States should receive elementary education at public expense.

This move to nonsectarian public education was not made without opposition. Many felt that education was strictly a private matter, with the responsibility for it resting with the parents and not with the state. Many feared that by excluding the instruction of religious teaching from public schools the result would be godless education. Others feared that if religion were taught, it would be unfairly slanted against the minority sects in the community. In both cases, the parents argued for their God-given right to control the religious education of their children.

Thus it was that with the establishment of public education in the United States, there developed a dual system of education. Many religious denominations developed their own system of parochial schools for the purpose of educating the children of their parishioners in both secular subjects and in the religious heritage of their church or denomination. They sought to avoid the increasing trend in the public sector toward the emphasis of humanism and relativism in education.

By the 1860s, free elementary schools were well established in the North and West. Following the struggle of the Civil War, southern states moved to develop similar systems for their children. As the United States became more industrialized and the population increased, the education provided by the parents and the schools, both public and private, was unable to meet the needs of society. Pressure began to

mount for additional free education at the secondary level.

In a landmark case for tax-supported public education, the Michigan Supreme Court set a precedent by ruling that education at any level could be supported by taxes, thus extending the principle of public-supported schools. The following is the conclusion of the Court:

> We content ourselves with the statement that neither in our state policy, in our constitution, or in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose.[3]

Following this decision, the enrollments in secondary schools across the nation rapidly increased.

As public education became entrenched as the American system of education, individual state legislatures began adopting compulsory attendance laws and minimum standards of education for schools within their states. Then, in 1922, the state of Oregon challenged the existence of a dual system of education--one public and one private. The Oregon Legislature had passed an act which asserted the state's control of education by requiring the attendance of all children under the age of sixteen in public schools. Three years later, the United States Supreme Court struck down the Oregon law and upheld the right of the parents to exercise a free choice of schools. Excerpts from the Court's decision follow:

> The challenged Act, effective September 1, 1926, requires every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him "to a public

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[3]Stuart et al. v. School District No. 1 of the Village of Kalamazoo, 30 Mich. 69 (1874).

school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void.

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.

The inevitable practical result of enforcing the Act under consideration would be destruction of appellee's primary schools; and perhaps all other private primary schools for normal children within the state of Oregon.

The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The 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.[4]

Today the schools of this country continue to engender argument, controversy, and interest. Parents and educators at times seem to wage open warfare over the quality of education received for tax dollars. Students, now educated as to their rights, rebel against the established procedures and practices of both the educational institutions and the home. Teachers, no longer required to be of good moral character or

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[4]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

patriotic disposition in their private lives, have become sensitive to their professional rights to the detriment of their responsibilities. They demand greater voice in the control of the learning process. Psychologists challenge the methods and procedures of instruction, define and redefine the causes of educational failure, and suggest solutions.

As a result of the Supreme Court's decision in the case of Abington School District v. Schempp (1963) in which they banned Bible reading and prayer in public schools as contrary to the First Amendment, there have been many who have abandoned the public schools for private, parochial, and independent Christian schools. This raises an important question. Should parents feel secure in their right to control the education of their children if nonpublic schools cannot exist in our economically inflated society without some form of tax support? Controls go hand in hand with government support. Yet another question comes to mind. What are the legal obligations of the Christian, parochial, and private schools in the eyes of the government?

Problem

"Federal courts and the Supreme Court of the United States are becoming increasingly involved in educational matters as more litigants claim violations of various rights protected by the federal Constitution."[5] While the basic control of the schools still lies with the local boards of education, there is today a great degree of overseeing on the part of the courts. Historically, from 1789 to 1850, the

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[5]E. Edmund Reutter, Jr., Schools And The Law, 3rd Rev. Ed. (New York: Oceana Publications, Inc., 1970), p. 3.

policies of both the state and federal courts were that of judicial laissez faire in the area of education. Then as the states became increasingly involved with the education of the children within their jurisdiction, they found it necessary to pass laws and judgments upon issues of conflict as the heterogeneity of the public schools increased, bringing about an era of state-controlled education (1850-1950).[6]

During this period, few cases found their way to the United States Supreme Court. It was not until the 1950s that the federal government became heavily involved in public school education. At this time, the Supreme Court turned its attention to the protection of the individual rights of minority ethnic groups under the Fourteenth Amendment. The cry for equal educational opportunity resulted in the federal courts taking a position of overseer in the area of education, and interjecting that state courts in their laws and decisions were judged to be in violation of the federal Constitution. Since that time, many state decisions have been overturned. This ushered in a new era of education under the supervision of the courts.[7]

This increase in the activity of the United States Supreme Court in the area of school law for the purpose of protecting the constitutional rights of the individual has also added to the difficulty of understanding the law as it pertains to any individual school and/or system of education. Following the lead of the courts, the United State Congress has also become more involved with the schools of the

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[6]John C. Hogan, The Schools, the Courts, and the Public Interest (Lexington: D. C. Heath and Co., 1974), p. 5.

[7]Ibid.

United States through passage of laws aimed at civil liberties and educational assistance through funding.

At this time of increased federal control over education, it is somewhat phenomenal to observe the rapid rise of the Christian school movement. While, as mentioned before, there has existed in this country a pluralistic system of schooling since the establishment of the free public system of education, it should be noted that in the last ten years the Christian school movement has skyrocketed to national prominence.

This rising phenomenon is the result of a deep concern for the education of their young on the part of Christian and non-Christian parents across the country. Contributing factors to this growth are: (1) a reawakening of an understanding of parental responsibility before God for the education of their children, (2) a turning away from the spiritual and moral absolutes of the Bible and the substitution of humanistic secularism and relativism in the public school system, (3) a lack of discipline and respect for authority found to be the norm in the public schools, (4) social evils allowed to go unchecked and in some cases propagated in the public school classroom, and (5) the lack of standards of excellence in education and the accommodation of student whims which are the hallmark of experience-centered existential education. The Christian school movement, then, is the return to moral absolutes and biblical authority, which have gradually been abandoned in our public schools under the direction of pragmatic and existential philosophers of education.

However, it is important to note here that the Christian school,

its administration, its staff, its pupils, and its parents are not a law unto themselves. As citizens of the United States and of various states and localities, we are bound by the law of the land and may not ignore, disregard or blatantly refuse to obey or conform to the established law of our community, state, or nation. This does not mean that there is not a higher law which transcends the laws of men; but we are commanded to "Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour" (Romans 13:7). Therefore, administrators and governing boards of Christian schools should be aware of those laws affecting them and attempt to comply with those laws in an effort to present a positive testimony of Christian education to their community and avoid the trauma, poor public relations, and discredit that accompanies litigation.

The following paper is devoted to specific aspects of the law affecting Christian schools. The term the law refers to all rules and opinions recognized by the courts. Some of the law is found in written and codified form such as in the Constitution, federal statutes, state Constitutions, state statutes, regulations of state level educational agencies, and regulations of the local level school authorities. All laws passed or enacted by the lesser authorities cannot be inconsistent with the laws of the higher authority when they are properly exercised. Therefore, state and local laws are subordinate to the federal Constitution. Since the reading of school codes would shed little or no light on the real problems faced by administrators, much of the following discussion will generally not deal with statutes at the local or state level.

The greatest body of law is not found in a precise codified form but is composed of court opinions where judges through the years have resolved issues and recorded their reasons for their decisions. This so-called case law or common law is the part of the law which clarifies and expands upon the written law in the absence of specific details on any given point. To a great extent, this paper will deal with case law rather than with specific legislative acts at the federal level, due to the fact that through the study of court decisions it is possible to find some degree of guidance as to what the law on an unadjudicated point is likely to be.

All laws in our society must be able to stand the scrutiny of judicial tests whenever a law or statute is objected to or challenged. The common practice today is for the complainant to bring suit against the school in the court system and the end result of the court's decision establishes the trend in school law. The fact that we are living in an age where constant change takes place makes it doubly important that school administrators become cognizant of principles of school law, the trends, and the potential of change brought about by shifts of position on the Court bench.

In this study of school law, it is in no way implied that changing social and cultural conditions will not bring about reversals of trends or rapid initiation of new and unforeseen principles; however, it is hoped that this study might provide the necessary guidelines for confidence as many Christian school administrators face the onslaughts of uncertainty.

Due to the large expanse of legal areas which could be covered

in a study of school law, of necessity this paper will be limited to the evaluation of four areas which are of major interest to Christian school administrators. They are: (1) the degree of jurisdiction of government, both federal and state, over Christian schools, (2) due process as prescribed by the Fourteenth Amendment, (3) federal aid to Christian schools, and (4) the Internal Revenue Service and Christian education.

In each of these areas, many questions persist. How do these areas of jurisprudence affect the Christian school and its administration? What can we expect five, ten, fifteen years from now in these areas? To what degree does the Christian school administrator have an obligation to inform his board, his staff, his students, and their parents about rights, privileges, and responsibilities before the law?

In particular, the following questions will be answered in considerable detail:

1. What jurisdiction does the state have over Christian schools?

2. To what degree must Christian schools comply with substantive and procedural due process?

3. Is federal aid a desirable goal for Christian schools?

4. Does the tax exempt status of Christian schools obligate them to accept federal controls in their system of education?

CHAPTER 2

LITERATURE

This attempt to provide guidelines for adequate understanding of school law as it affects the Christian school movement is unique. Many others have written regarding the influence of school law in the public school and have sometimes lightly touched on the subject of private education. The bulk of information available, however, does not do justice to the unique problems confronted by the Christian schools as they attempt to reconcile principles of Christian living to the demands of human government.

In the development of historical research, it is necessary to sort out all pertinent information and compile, evaluate, and interpret that information. In the area of law the task becomes even more difficult due to the fluctuation of human nature in its goals, values, and culture.

As was pointed out in the previous chapter, most of the literature for this paper is derived from case law rather than from textbooks, periodicals, manuscripts, et cetera. Since the purpose of this thesis is to assemble information pertinent to school law and to interpret this information, there is no hypothesis and no disagreement with facts presented by authorities on school law who have written on the subject. Where the disagreements may come will be in the area of prediction based upon precedent and trends in case law. As Chester Nolte has pointed out:

> Historians remind us that our generation is the first to be living in a world which is entirely different from the one into which we were born. What we once accepted as well-settled principles of economics, political science, philosophy, psychology and sociology are being tested and changed, with the result that many of our decisions must be innovative creations from new cloth. In such an unusual period of human history, person-to-person and person-to-government relationships are being revised, even transformed, with the result that societal norms and standards long accepted and practiced are falling by the wayside. It is a period of testing, of challenge, of probing for answers to human problems thought entirely at rest.[8]

As can be seen, any prediction, even based upon precedent and trends, is replete with danger. All law must have a basis for authority. In the United States, that authority is the Constitution and as such will be foundational in the development of any paper dealing with law. However, the interpretation of the Constitution is the responsibility of the courts--thus the confusion.

The evaluation and clarification of this literature (constitutional and case law) will hopefully serve as an effective guide to school law.

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[8]M. Chester Nolte, Guide to School Law (West Nyack: Parker Publishing Company, Inc., 1969), pp. x-xi.

CHAPTER 3

PROCEDURE

In dealing with the subject of school law and the Christian school, each of the four areas of law will be dealt with separately rather than as a composite whole. The facts of laws governing jurisdiction, due process, financial aid, and IRS controls will be presented accurately and clearly. Accompanying these facts will be annotated observations drawn from both personal evaluations and comments by noted legal authorities. The foundation of the entire thesis will be <u>case law</u>.

CHAPTER 4

RESULTS

Jurisdiction: The State or the Parent

"The 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."[9]

"Today, education is perhaps the most important function of the state and local governments."[10]

One of the major questions in the mind of many a Christian school administrator is the degree to which federal and state governments have authority to control the operation of a privately funded Christian school. The foregoing quotations are both basic to any discussion on the question of jurisdiction. The first supports the philosophy of parental control over the education of their children. On the other hand, the second touts the doctrine of education as a state interest. Are the two positions irreconcilable?

The term "jurisdiction," as it is used in this discussion, is defined as ". . .the limits. . .within which authority may be exercised."[11] In keeping with this definition, three levels of authority must be explored in order to determine the limits of their control in

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[9]Pierce v. Society of Sisters, supra at 1078.

[10]Brown v. Bd. of Education, supra at 483.

[11]Webster's New Collegiate Dictionary (1976), p. 628.

the educational process. Those three levels are identified as: (1) the federal government, (2) the state government, and (3) the parents. The first two levels are within the realm of governmental authority while the third is within the realm of individual authority.

Education and the Federal Government

Our national government is based upon a system of government known as federalism. "A federal government is one in which a constitution divides governmental power between a central and sub-divisional governments, giving to each substantial functions."[12] One of the areas of power which is divided between federal, state, and local governments is the power to provide free public education. As was mentioned in the introduction to Chapter 1, the Constitution provides for no direct control or authority over education. Nevertheless, the federal government has exercised considerable influence in the development and evolution of the school system in the United States. This influence has been in the form of both direct and indirect involvement as exerted through the various federal branches of government.

Even prior to the writing of the Constitution, the national government under the Articles of Confederation provided a precedent for the involvement of the government in education through grants of public funds. The passage of the Ordinances of 1785 and 1787 provided for land grants to the states from the public domain for the maintenance of public schools. Thereafter, the involvement of the government in the

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[12]Edward S. Corwin and J. W. Peltason, Understanding the Constitution, 4th Ed. (New York: Holt, Rinehart and Winston, 1967), p. 20.

education of its citizens ". . .has been supportive, continuous, and immense."[13]

> Congress has exercised over the years much direct influence through its constitutional power "to lay and collect taxes. . .to pay the debts and provide for the common defense and general welfare of the United States." Actually the extent of this power in relation to public education is judicially uncertain. There has been no direct judicial test involving specifically education. However, the interpretations of the Supreme Court of the United States in related areas give rise to the belief that Congress does indeed have the power to provide federal financial aid to education. Also it would appear difficult to argue at the present time that public education is not connected with "the general welfare of the United States" as a whole.[14]

Therefore, it may be said that federal control of education through acts of Congress is tied closely to both federal financial grants and the general welfare clause of the Constitution.

The United States Office of Education is an agency of the executive branch of the government under the Department of Health, Education, and Welfare. This office was established in 1867 for the purpose of collecting statistics and facts on education and diffusing the information in order to aid the people of the United States in operating an efficient and uniform system of education throughout the country. Its role is purely advisory in nature rather than authoritarian and as such it exercises no control over education in the United States.

As a branch of the federal government, the Supreme Court of the United States has had the greatest degree of influence over education in the United States.

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[13]Nolte, Guide to School Law, p. 157.

[14]Reutter, Schools and The Law, p. 5.

> Even though education itself is not mentioned in the federal Constitution, many of the amendments to the Constitution involve problems directly associated with it. Also, the provision within the Constitution prohibiting any state from impairing the obligations of a contract has been a factor in many cases involving education which have come before the Supreme Court through the years.
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> The First Amendment is the legal basis of many issues rather constantly in the courts which may be broadly categorized as church-state-education relationships. Since 1947 the Supreme Court has rendered six highly significant decisions bearing on public policy in this area. The cases have involved sectarian religious instruction within public school buildings, released time during the school day for pupils enrolled in public schools to attend religious instruction outside of the public schools, recitation of prayers and Bible reading in the public schools, and provision of transportation and textbooks at public expense for children attending schools sponsored by religious groups. . . .
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> The Fourteenth Amendment has been crucial to most of the cases involving education which have been decided by the Supreme Court. The "due process" and "equal protection" concepts have been invoked in cases upholding such diverse rights as the right of teachers to criticize education policies, the right of private schools not to suffer loss of income because of compulsory attendance of children in public schools, the right of parents to have their children study German, and the right of pupils to wear armbands to protest United States foreign policy. It was on Fourteenth Amendment grounds that the Court in 1954 declared unconstitutional pupil assignment policies based on race which were in effect in seventeen states and the District of Columbia.[15]

Education and the State

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."[16] In the absence of any mention of education in the Constitution proper, it becomes a function of the state, in keeping with the Tenth Amendment. It should be stressed, however, that the states must exercise their reserved powers subject to the national government's supremacy and national constitutional limitation. Even

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[15] Ibid., pp. 10-11. [16] U.S. Const. amend. X.

though the states have the right to establish public schools, they may not do so in such a way as to abridge the Fourteenth Amendment or any other constitutional limit.[17]

The individual states regulate education within their own borders by establishing education codes which set minimum standards of excellence as guidelines for measuring and maintaining the quality of education. The legislatures of the various states have also enacted state-wide compulsory education laws which require school attendance of all children under the age of sixteen who reside within the state. These rules and regulations are not binding upon the public schools only. Each administrator of a Christian school should be as equally aware of state educational requirements as his counterpart in the public school.

The necessity for this awareness stems from the states' purpose for education. Contrary to the widely held opinion that public schools were established to benefit the individual, the primary purpose was to benefit the state. According to this theory, the school exists as an agent of the state for the purpose of perpetuating government as we know it in the United States. "So important is the education of its citizenry that the state may do much, go a great distance indeed, by way of control over the educational future of its children in order to carry out this function."[18] In upholding this principle of education for the benefit of the state, the courts have repeatedly maintained that

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[17]Corwin and Peltason, Understanding the Constitution, pp. 132-133.

[18]Nolte, Guide to School Law, p. 158.

education is a compelling state interest.

In the state of Kentucky, the interest of the state was held to be superior to the interest of the local city council. In awarding a writ of mandamus compelling the city council to pass a needed tax levy, the court said:

> Whilst public education in this country is now deemed a public duty in every state, and since before the first federation was regarded as a proper public enterprise, it has never been looked upon as being at all a matter of local concern only. On the contrary, it is regarded as an essential to the preservation of liberty - as forming one of the first duties of a democratic government. The place assigned it in the deliberate judgment of the American people is scarcely second to any. If it is essentially a prerogative of sovereignty to raise troops in time of war, it is equally so to prepare each generation of youth to discharge the duties of citizenship in time of peace and war. Upon preparation of the younger generations for civic duties depends the perpetuity of this government.[19]

Again, in the case of Scown v. Czarnecki, the Illinois Supreme Court held that the state's interest is served when the state through its school system establishes rules and regulations concerning the health and welfare of its citizens. Should individuals benefit as a result, it is incidental to the primary purpose of ". . .protection, safety, and welfare of the citizens of the State in the interest of good government."[20] On the same subject, another court held:

> Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the school provided for them, they may be compelled to do so. . . . While most people regard the public schools as a means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental

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[19]City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411 (1909).

[20]Scown v. Czarnecki, 264 Ill. 305, 106 N.E. 276 (1914).

means of protecting the state from the consequences of an ignorant and incompetent citizenship.[21]

With this philosophy of the purpose of education, is it any wonder that the state of Ohio, in its compulsory education law, words it thusly: "The natural rights of a parent to custody and control of their children are subordinate to the power of the state to provide for the education of such infant children."?[22]

Education and Parental Rights

From the very beginnings of our colonial heritage, the freedom of choice has been ingrained into the fiber of the American system of education. The New England colonies were established on the foundation of religious liberty and individual rights. Coupled very closely to that religious freedom was the right to educate your children in the same beliefs of the parents and community.

As our nation grew and developed, a conflict of ideologies developed. Out of Jefferson's belief that the education of all citizens was necessary for the continuation of our democratic society developed the idea that the purpose of education was for the protection of the state. On the other hand, those who maintained that the education of children was the responsibility of the parent established schools which perpetuated their faith through the education of their children. As a result of the establishment of two different systems of schools in the United States, one public and one private, conflict was inevitable.

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[21]Fogg v. Board of Education, 82 Atl. 173 (N.H. 1912).

[22]First quoted in Parr v. State, 117 U.S. 23, 26, 157 N.E.2d 555. See also Ohio Rev. Code § 3321.04.

The first case of note was brought about by the attempt of the state of New Hampshire to bring Dartmouth College, a private school under British charter, into the educational system as a state-controlled institution. The trustees of Dartmouth College brought suit claiming violation of the contract clause of the Constitution.[23] Chief Justice Marshall, in writing for the Court, held that education is not solely a governmental responsibility but may well be discharged by a private corporation. He writes:

> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?
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> Doctor Wheelock, as the keeper of his charity-school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary

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[23] U.S.Const. art. 8, § 10: "No state shall. . .pass any. . . ex post facto Law, or Law impairing the Obligation of Contracts, . . ."

Following is Corwin's observations on this section of the Constitution:

"The prevention of such interferences with private rights by the state legislatures was one of the major purposes of the Convention.

The framers, when they spoke of 'contracts' whose obligations could not be impaired by state law, had in mind the ordinary contracts between individuals, especially contracts of debt. However, the meaning of the word was early expanded by judicial interpretation to include contracts made by the states themselves, including franchises granted to corporations. As a result, the 'obligation of contracts' clause became prior to the Civil War the most important defense of the rights of property in the Constitution. States were prevented from passing any law, whether in the interest of the public welfare or not, that might materially disturb rights secured by contract. . . . Today, the due process clauses of the Fifth and Fourteenth Amendments have largely replaced the contract clause as safeguards of the property right."

> contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his care to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant-tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact, that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.
>
> Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary - not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government.[24]

Marshall further held that a private institution of learning may be established for a purpose not necessarily in keeping with the purpose of state established centers of learning--namely, for the benefit of the state.

> We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. . . .
>
> The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions.

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[24]Dartmouth College v. Woodward, 4 Wheaton 634, 635 (1819).

> In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be established. . . . So that the objects of the contributors, and the incorporating act were the same; the promotion of Christianity and the education generally, not the interest of New Hampshire particularly.[25]

The significance of this particular case to the supporters and operators of present day Christian schools is twofold. First, a dual system of education was recognized as legitimate by the Supreme Court. Second, it was established that the state could not control private institutions of learning by absorbing them into the state system of education through the abrogation of their charters (contracts) and thereby changing the character of the institution from that intended by its founder(s) to that which would reflect the philosophy of the state.

While this case did not address itself directly to the question of the jurisdiction of parents over their children, it is important to note that by the very fact that there has here been established a plural system of education, this must of necessity imply that there is the freedom of choice. One then may choose to attend either a state supported public institution or a privately maintained institution.

For the remainder of the nineteenth century there were no major challenges to private education. However, in 1923 a case came before the Court which raised a new issue. This decision would affect not only the parochial schools in the nation but also the public schools as well.

In 1919 the state of Nebraska passed "An Act Relating to the

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[25] Id. at 639-640.

Teaching of Foreign Languages in the State of Nebraska." This law stipulated that it was unlawful for any person to teach any foreign language to a student until the pupil had successfully completed the eighth grade. In May of the following year, the defendant, Meyer, a teacher at the Zion Parochial School, taught German to a ten-year old student. Meyer was tried and convicted and in the process of the appeal the Supreme Court of the state affirmed the conviction. The state maintained that the purpose of the statute was to assure that English was the mother tongue of all children reared in that state and that the enactment was justified under the state's police power. The defendant, on the other hand, maintained that the law was an infringement of his rights under the due process clause of the Fourteenth Amendment. Justice McReynolds, in delivering the opinion of the Court, maintained that the "mere knowledge of the German language cannot reasonably be regarded as harmful."[26]

The conflict in this case is between the principle of the state's interest (i.e. the promulgation of civic development--in this case by inhibiting the teaching of a foreign language and ideals to the immature), and the plaintiff's "right thus to teach and the right of parents to engage him so to instruct their children, . . ."[27] The position of the Court was as follows:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all--to those who speak other languages as well as

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[26]Meyer v. Nebraska, 262 U.S. 400, 67 L.Ed. 1045 (1923).

[27]Id. at 1046.

> to those born with English on the tongue. . . . --a desirable end cannot be promoted by prohibited means. . . .
>
> The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. . . . But the means adopted, we think, exceeds the limitations upon the power of the state, and conflict with rights assured to plaintiff in error.[28]

While protecting the right of the defendant to pursue his chosen occupation of teaching foreign language, this case also addressed the question of parental rights in the choice of education for their children.[29] The Court recognized the right of the state to utilize compulsory attendance laws as an instrument for compelling parents to meet obligations to educate their children. The Court said: "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws."[30] However, while thus recognizing the plenary power of the state

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[28] Ibid.

[29] In applying the principles of this case to Christian education, a word of caution should be rendered. While it is proper to interpret this decision as being significant in that state legislatures may not prohibit the inclusion within the curriculum of Christian schools subjects which may not be allowed in public schools (i.e. Bible curriculum), it does not deny the state power to proscribe reasonable regulations. The Court further stipulated in its findings in this case that:

"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. . . . Our concern is with the prohibition approved by the Supreme Court. (Emphasis added.) Meyer v. Nebraska, supra at 1046."

[30] Id. at 1045.

legislature over education in the state, the Court held that this power was not without limitation and that parents had the right to choose additional curriculum for their children beyond that prescribed by the state.

Two years later, another case came before the Supreme Court which determined the future of Christian education and the right of parents to choose the education they desired for their children. In this case, the state of Oregon, seeking to standardize its system of education and guarantee success in fulfilling its state interest, passed the Compulsory Education Act. This statute required all children between the ages of eight and sixteen to attend public school within the district in which each child resided.

Two private schools, one a parochial school operated by the Society of Sisters of Holy Names, the other Hill Military Academy, sought injunctive relief on the basis that their rights under the Fourteenth Amendment were being infringed upon. The Society's bill stated:

> . . .the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void.[31]

The preliminary injunction granted to Hill Military Academy further stipulated that:

> . . .the right to conduct schools was [a right of] property, and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also that appellees' schools were not unfit or harmful to

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[31] Pierce v. Society of Sisters, supra at 1077.

> the public and that enforcement of the challenged statute would unlawfully deprive them of patronage, and thereby destroy appellee's business and property.[32]

In upholding the lower court's ruling that the law violated the rights of private schools to do business and the rights of parents to direct the education of their children, Justice McReynolds referred to the previous decision of the Court in Meyer:

> Under the doctrine of Meyer v. Nebraska, . . .we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The 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.[33]

While supporting the promulgation of private education with this decision, the Court was again quick to point out that the right of the state to control private education in keeping with the state interest was not lessened. Said the Court:

> 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.[34]

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[32] Ibid. [33] Id. at 1078. [34] Id. at 1078.

Education and the Triumvirate of Jurisdiction

In turning our thoughts once again to the question of jurisdiction, the logical conclusion is that the courts allow authority to be exercised at all three levels--federal, state, and parental.

The Supreme Court of the United States, a branch of the federal or national government, has the responsibility of arbitrating through judicial review all questions of jurisdiction as they pertain to the Constitution. Corwin describes judicial review as "the power of judges, ultimately those of the Supreme Court, to interpret the Constitution and to refuse to enforce those measures that in their opinion are in conflict with the Constitution."[35] When the interests of the federal government come into conflict with the interests of the several states, or when the Constitutional rights of an individual seem to be threatened by either the federal or state governments or by another individual or enterprise, the Supreme Court must make the final determination of the limits to be placed on authority.

As illustrated, the national as well as state governments have compelling interest in the education of the citizens. While the federal government is not directly granted control over education in the Constitution, Congress has utilized the general welfare clause to justify expenditure of public funds in support of public education. To the degree that Congress grants these public funds there is a proportionate degree of jurisdiction over education. Jurisdiction over education within the several states is a power reserved to the states through the

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[35]Corwin and Peltason, Understanding the Constitution, p. 27.

Tenth Amendment. Education then does become a state function, as stated in Brown v. Bd. of Education of Topeka, supra. State and federal courts have consistently held that the primary purpose of education is for the benefit of the state and that any benefit to the individual is incidental.[36]

However, the right of the parent in controlling the education of his children cannot be overlooked. The Court has found in applying both the contract clause (art. 1, § 10) of the Constitution and the Fourteenth Amendment to the question of private education that (1) private schools may exist along with public schools and that both may meet the state interest in education, (2) legislatures have plenary albeit limited power over education within their state--the use of knowledge is not construed to be harmful per se--therefore, private individuals may freely pursue and teach that knowledge which they desire, and (3) parents have the right to choose the direction of their children's education through private schools without interference from the state provided that the private schools meet reasonable standards as prescribed by the state.[37]

Therefore, if there is no clearly defined and adjudicated delineation between government and citizen in the area of educational

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[36]See City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411 (1909); Scown v. Czarnecki, 264 Ill. 305, 106 N.E. 276 (1914); Fogg v. Bd. of Educ., 82 Atl. 173 (N.H. 1912); Dartmouth College v. Woodward, 4 Wheaton 634 (1819); et al.

[37]See Dartmouth College v. Woodward, 4 Wheaton 634 (1819); Meyer v. Nebraska, 262 U.S. 390 (1923); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

jurisdiction, the problem of disposition of future conflicts remains unanswered. However, based upon precedent established by the aforementioned cases as well as several more recent cases, predictions may provide answers to some basic questions still unanswered in regard to problems of law confronting Christian school boards and administrators.

Educational Jurisdiction and the Christian School

The major remaining question, in regard to conflict between the Christian school and jurisdiction over its operation by public authorities, is that of enforcement of minimum standards and compulsory education. At what point do the state's minimum standards become oppressive or infringe upon the right of the school to include the teaching of religious subjects in its curriculum?

As pointed out previously, the state has the power to promulgate and enforce reasonable regulations affecting the operation of all nonpublic schools. In Board of Education v. Allen (1968), the Court ruled:

> . . . 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. . .if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which these schools perform their secular educational functions.[38]

Even more recently, in the Amish case, which questioned compulsory attendance laws on the basis of the First Amendment, the Court clearly interpreted the law as follows: "There is no doubt as to the

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[38]Board of Educ. v. Allen, 392 U.S. 236, 20 L.Ed.2d 1060 (1968).

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."[39] These decisions are, of course, in keeping with previously cited cases such as Pierce v. Society of Sisters and Meyer v. Nebraska. How, then, may those involved in the operation of Christian schools understand their rights with reference to the First Amendment, which provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."? May minimum standards and compulsory attendance at some point conflict with the free exercise of religion?

The Court has previously dealt with problems directly related to this First Amendment problem. In addressing themselves to the question of what constitutes a legitimate religious belief protected by the free exercise clause, the Court has held that "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."[40]

Since the Court could not question the truth of the belief or doctrine itself, it chose to apply the following test:

> . . . while the "truth" of a belief is not open to question, there remains the significant question as to whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is of course a question of fact. . . .[41]

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[39]Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15 (1972).

[40]United States v. Ballard, 322 U.S. 78, 88 L.Ed. 1148 (1944).

[41]United States v. Seeger, 380 U.S. 163, 13 L.Ed.2d 733 (1965).

In Abington School District v. Schempp (1963), the Court stated the purpose of the free exercise clause of the First Amendment,

> . . .is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.[42]

One such case of interest is a case in the state of Ohio. In substance, Ohio's State Board of Education attempted to suspend operations of Tabernacle Christian School because it was not chartered by the state. Because the school continued to function, the state attempted to bring criminal charges against the parents of the children attending Tabernacle Christian on the basis of child neglect and truancy. Darke County Court of Common Pleas found Reverend L. W. Whisner, his wife, and eleven parents guilty of failure to send children to school. The Common Pleas judgment was sustained by the Court of Appeals. In the midst of great controversy, the case was received on appeal by the Ohio Supreme Court. The defendants were represented by Mr. William B. Ball who, in 1972, persuaded the Supreme Court of the United States, unanimously, in the case of Wisconsin v. Yoder, to free Amish children from compulsory attendance at public schools. In its overturning of the decision of the Court of Appeals, the Ohio Supreme Court quoted repeatedly from Wisconsin v. Yoder.

In writing the opinion of the Court, Justice Celebrezze stated the basics of the case thusly:

> This cause presents sensitive issues of paramount importance involving the power of the state to impose extensive regulations

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[42]Abington School District v. Schempp, 374 U.S. 203 (1963).

> upon the structure and government of non-public education, and conversely, upon the right of these appellants to freely exercise their professed religious beliefs in the context of providing an education to their children.[43]

In applying the test of United States v. Seeger, the Court found that:

> . . .there can be no doubt but that appellants' religious beliefs are "truly held." Rev. Whisner's testimony clearly reveals that the religion in which he believes is a historical religion consisting of "born-again" Christians, who adhere to a life of separation from worldliness, and who strictly structure their lives upon a subjective interpretation of Biblical language.[44]

The Court found that the requirements of the state educational code that all activities of the nonpublic religious school conform to the standards set by the state were an infringement upon the appellees' right to the free exercise of religion. The Court's argument follows:

> Our review of the particular "minimum standards" objected to by appellants discloses that the language utilized in those standards is facially neutral. Although appellants argue that no reference is made in those standards to God or to Biblical instruction, we think it plain that to do so would constitute a violation of the establishment clause of the First Amendment. . . .
>
> However, as required by Wisconsin v. Yoder, . . . , we must also determine whether "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality. . .[because] it unduly burdens the free exercise of religion."
>
> In this regard we must conclude that the compendium of "minimum standards" promulgated by the State Board of Education, taken as a whole, "unduly burdens the free exercise of [appellants'] religion."
>
> To begin with, although admittedly an admirable effort to extol the secular aims of the state in assuring that each child educated in this state obtains a quality education, we believe that these "minimum standards" overstep the boundary of reasonable regulation as applied to a non-public religious school.

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[43]State of Ohio v. Whisner, 351 N.E.2d 750, 759 (1976).

[44]Id. at 760.

It must be remembered that one of the "minimum standards" requires compliance will [sic] all such standards before a charter can be granted.

If the state is to discharge its duty of remaining strictly neutral, pursuant to the establishment clause of the First Amendment, with respect to religion, how can the state constitutionally require all activities of a non-public religious school which, of necessity, must include religious activities, to conform to the policies of a purportedly "neutral" board? As stated long ago in Bd. of Edn. v. Minor (1872), 23 Ohio St. 211, 249-251:

"The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or one class of men, to what extent may it group together conflicting opinions? Or may it group together the opinions of all? And where this conflict exists, how thorough will the teaching be? Will it be exhaustive and exact, as it is in elementary literature and in the sciences usually taught to children? And, if not, which of the doctrines or truths claimed by each will be blurred over, and which taught in preference to those in conflict?"

But it will be asked, how can religion, in this general sense, be essential to good government? Is atheism, is the religion of Buddha, of Zoroaster, of Lao-tse, conducive to good government? Does not the best government require the best religion? Certainly the best government requires the best religion. It is the child of true religion, or of truth on the subject of religion, as well as on all other subjects. But the real question here is, not what is the best religion, but how shall this best religion be secured? I answer, it can best be secured by adopting the doctrine of this 7th section in our own bill of rights, and which I summarize in two words, by calling it the doctrine of "hands off." Let the state not only keep its own hands off, but let us also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest--that is, the intellectually, morally, and spiritually weakest--will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of "church and state." Among the many forms of stating this truth, as a principle of government, to my mind it is nowhere more fairly and beautifully set forth than in our own constitution. Were it in my power, I would not alter a syllable of the form in which it is there put down. It is the true republican doctrine. It is simple and easily understood. It means a free conflict of opinions as to things divine; and it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict

> free, and preventing the violation of private rights or of the public peace. Meantime, the state will impartially aid all parties in their struggle after religious truth by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. It means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that although in the minority, he shall be protected in the full and unrestricted enjoyment thereof. The "protection" guaranteed by the section in question, means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many.
>
> There is an additional, independent reason, ignored by the lower courts in this case, that compels upholding appellants' attack upon the state's "minimum standards." In our view, these standards are so pervasive and all-encompassing that total compliance with each and every standards by a non-public school would effectively eradicate 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.[45]

As touching the right of the parents to direct the education of their children, the Court quoted from three earlier cases: Farrington v. Tokushige, 273 U.S. 284, 71 L.Ed. 646 (1927),[46] Pierce v. Society of

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[45] Id. at 764-768.

[46] The issue in Farrington was the right of parents to direct the education of their children. A number of privately owned foreign language schools had opened their doors to students whose parents desired specialized training in the languages for their children. Such advanced training was not available in public schools. The Hawaiian territorial legislature had passed a law regulating all such foreign language schools within its jurisdiction. Among other things, the act provided that: (1) the schools and their teachers obtain permits from the Department of Public Instruction, (2) the Department was to fully control the prescribed prerequisites for enrollment, the curriculum to be taught, and the textbooks to be used, and (3) the schools could not operate before or during regular hours of operation of the public schools. In declaring the law unconstitutional, the Court said: "The foregoing statement is enough to show that the School Act and the measures adopted thereunder go far beyond mere regulation of privately

Sisters, supra (1925), and Meyer v. Nebraska, supra (1923). Each of these cases was decided prior to the landmark decision in Cantwell v. Connecticut, 310 U.S. 296, S.Ct. 900, 84 L.Ed. 1213 (1940), in which the First Amendment guarantees were incorporated into the due process clause of the Fourteenth Amendment, and were therefore made directly applicable to the states. As stated in Whisner,

> It has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a "fundamental right" guaranteed by the due process clause of the Fourteenth Amendment.[47]

The conflict in Whisner, as the Court perceived it, was one which pitted the right of the state to control all education within its boundaries against the right of the parents to direct the education of their children. After judging the merits of this case, the Court, in upholding the rights of the parents, stated:

> The "minimum standards" under attack herein effectively repose power in the State Department of Education to control the essential elements of non-public education in this state. The expert testimony received in this regard unequivocably demonstrates the absolute suffocation of independent thought and educational policy, and the effective retardation of religious philosphy engendered by application of these "minimum standards" to non-public educational institutions.

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supported schools, where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give affirmative direction concerning the ultimate and essential details of such school, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks. Enforcement of the act probably would destroy most, if not all, of them; and certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."

[47] State v. Whisner, supra at 765.

> Through application of these "minimum standards" to non-public schools, the state retains the power to regulate the following: The content of the curriculum that is taught, the manner in which it is taught, the person or persons who teach it, the physical lay-out of the buildings in which the students are taught, the hours of instruction, and the educational policies intended to be achieved through the instruction offered. In short, what the state gives to a non-public school through including a requirement in the "minimum standards" that the operation of the school must be consistent with its own stated philosophy . . . , it takes away by compelling adherence to all the "minimum standards," the effect of which is to obliterate the "philosophy" of the school and impose that of the state.[48]

The Court further held that: "In the opinion of a majority of this Court, a 'general education of a high quality' can be achieved by means other than the comprehensive regimentation of all academic centers in this state."[49]

The finding of the Ohio Supreme Court in the case of State v. Whisner will undoubtedly be used to bulwark any other such case in the future. While this is a victory for Christian education, a word of caution must be inserted. In reversing the lower court's decision in this case, the Supreme Court of Ohio did not sweep away the doctrine of state interest which allows the state to control education within its boundaries. The Supreme Court of the United States established guidelines for determining if state regulations of nonpublic education are reasonable and therefore enforceable. The Court stated:

> When the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, 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.[50]

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[48] Id. at 770. [49] Id. at 771.

[50] Wisconsin v. Yoder, supra at 233, 92 S.Ct. at 1526, 1542.

What the Court required was a finding "that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[51]

Therefore, it should be noted that each case must then stand upon its own merits rather than relying solely upon findings in a case such as Whisner. The burden of proof would be upon the individuals claiming an infringement of their free exercise rights by the state. The individuals must also face the scrutiny of the court in the test of sincerity (is the belief truly held?). Finally, the court must determine if there is a state interest of sufficient magnitude to override the claim of violation of the right to freely exercise religious beliefs and that its interest could not otherwise be served.

In evaluating the preceding discourse on jurisdiction, the following conclusions are of import to the Christian school board and administrator:

(1) The state does not have unlimited authority over private institutions. It may not change the character, philosophy, or purpose of the institution from that intended by its founders to that which would reflect the philosophy of the state (Dartmouth College v. Woodward).

(2) Parents have the right, protected by the Fourteenth Amendment, to direct the education of their children. They may choose the curriculum and engage an instructor to teach their child. Knowledge in and of itself is not harmful (Meyer v. Nebraska).

(3) The state may not force school age children to attend only

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[51] Id. at 214, 92 S.Ct. at 1532.

public schools. To do so would infringe upon the right of the parents to direct the education of their children and would deprive private schools of due process of the law by depriving them of patronage and thereby destroying their business and property (Pierce v. Society of Sisters).

(4) The right of parents to educate their children in a Christian school as an extention of their First Amendment right of free exercise of religion may not be infringed upon by the state. The only exception would be if there is a state interest of sufficient magnitude to override the aforementioned right and that the state interest could not otherwise be served (Wisconsin v. Yoder and State of Ohio v. Whisner).

Fourteenth Amendment: Due Process and Equal Protection of the Law

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[52]

To this point, mention of the due process and equal protection clauses of the Fourteenth Amendment have been in the context of supportive argument. They have been utilized by parents in the defense of their liberty to direct the education of their children and in defense of their First Amendment right to the free exercise of religion. They have also been utilized in the protection of the right of private schools to do business and thereby protect their right of property.

Originally, the Fourteenth Amendment was passed to protect the

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[52] U.S. Const. amend. XIV, § 1.

rights of the post-Civil War Negroes--first by declaring them to be citizens of the United States,[53] second by granting to them all privileges or immunities, due process of law, and equal protection of the laws. Of course, it was not only the Negroes who benefited from the ratification of this amendment, but every citizen of the United States. Through this amendment, the right of due process has been carried over from a protection against federal government infringements as proscribed in the Fifth Amendment, to include state governments.

The purpose of this amendment, then, is to protect the rights of the individual from the potential encroachment of government control over all aspects of life, as is found in more totalitarian governments. In short, the protection of individuals by the Fourteenth Amendment is an immunity against state, not private, action. This being the case, it would seem, on the surface, that Christian schools as private institutions are not bound by the Fourteenth Amendment decisions which, to such a great degree, control the operation of the public school system as an agency of the state government.

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[53]Cf. Dred Scot v. Sanford, 19 Howard 393 (1857), in which Chief Justice Taney stated that the framers of the Constitution did not consider Negroes a part of the sovereign people of the United States. He wrote:

"[Negroes] were not intended to be included, under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." (Emphasis added.)

The opening sentence of the Fourteenth Amendment reversed this decision.

To date, there has been no case where any court has held a private school in violation of infringement of individual rights under the Fourteenth Amendment. Since the Christian school is a private institution providing a service on a contractual basis with a private citizen, the person engaging the services is under no obligation to continue under the contract if the service rendered is unsatisfactory. For example, if parents were to enroll their child in a private Christian school which exercised corporal punishment as one of its methods of discipline, and the child was disciplined in such a manner, it would be the right of the parents to withdraw their child from the school. They could not, however, bring suit against the school on the basis of the Fourteenth Amendment umbrella [Cantwell v. Connecticut, supra] which protects the right of the individual from cruel and unusual punishment [U.S. Const. amend. VIII.][54]

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[54]It should here be noted that there could be the possibility of assault and battery charges if the state law forbids corporal punishment or if the punishment was out of proportion to the offense. Christian schools and their officers may not disregard state or local ordinances without suffering the consequences of their actions. If a particular law or statute is seemingly a violation of the rights of the school or parents, the prescribed avenue of litigation must be followed to attempt to reverse the opposed law. In Ingraham v. Wright, 525 F.2d 909, at 915, the court held:

"We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiffs was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized. . . . The basis of such action is, however, tort and criminal law, not federal constitutional law." They further held [Id. at 917]:

"We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than

While Christian schools are not currently held accountable for the civil liberties of the parents, students, and staff of their organization, the door is not altogether closed to the future possibility that such will not be the case. Currently, Christian schools may choose to exclude a minority group such as Negroes; if the schools receive any kind of financial or other public support (such as tax exemption),[55] however, their conduct becomes subject to the limitations of the Fourteenth Amendment under the equal protection clause.

Another area of potential erosion in the exclusion of Christian schools from compliance with Fourteenth Amendment restrictions is what is known as the public function doctrine.

Public Function and Fourteenth Amendment Rights

"Ownership does not always mean absolute dominion. The more an owner for his advantage opens up his property for use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it."[56] Mr. Justice Black, who wrote the opinion of the Court in Marsh, here set forth a doctrine of law far reaching in its consequences.

In this particular case, the Court held that a company-owned town did not have the right to enforce legislation which would suppress the First Amendment rights of free expression of the citizens residing

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ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child."

[55]For further discussion, see p. 89.

[56]Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 268 (1946).

within the community. The Court reasoned that:

> . . .[w]hen we balance the Constitutional rights of the owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. (Footnote omitted.)[57]

While on the surface, this case may seem unrelated to school law in general, there is an underlying current which could rise up to engulf nonpublic education in the tide of Fourteenth Amendment litigation continually before the courts. As private institutions, the Christian schools could, under this public function doctrine, be held accountable for the protection of individual rights just as the public schools.

In 1966, another public function case came before the Court, this time dealing with the issue of public use of a park. The privately owned park had been open for city use by a local citizen in 1901 with the expressed intention that it should be a segregated park for whites only. In 1966, the Court held that the park fell under the public function doctrine and consequently ruled that the trustees of the park could not forbid use of the park by Negroes.[58]

Mr. Justice Harlan, with whom Mr. Justice Stewart joined in writing his dissent to the majority decision in Evans, said in part:

> More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing--among other examples that might be drawn from the still unfolding sweep of governmental functions--the "public function" of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private control

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[57] Id. at 270.

[58] Evans v. Newton, 382 U.S. 296, 15 L.Ed.2d 373 (1966).

> exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.
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> For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Courteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.
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> While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States. (Emphasis added.)[59]

As can be seen by the Justice's comments, the potential for greater federal control in the operation of Christian schools is easily within the power of the Court to grant, should it choose to do so, under the public function doctrine. The conclusion rests upon the future adjudication of the Court. As it now stands, the Christian school is not under the bondage of the Fourteenth Amendment. However, the potential for such bondage, under the public function doctrine, looms over the horizon.

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[59] Id. at 389, 390.

It is primarily for another reason, however, that policies for the effective operation of Christian schools should not only follow the principles of due process, but in a sense exceed them. Christian schools, if they are indeed to be considered Christian, should be based upon attitudes that are Christ-like and controlled by the Holy Spirit. The Apostle Paul, in writing to the Galatian Christians, admonished them to exhibit characteristics of ". . .love, joy, peace, longsuffering, gentleness, goodness, faith, meekness, temperance: . . ." (Galatians 5: 22, 23). These same characteristics should exemplify the interpersonal relationships of the Christian school. Paul further stipulates in 1 Corinthians 14:40 that all things are to "be done decently and in order." These principles are indeed compatible with the principle of due process as prescribed by the Fourteenth Amendment. This, then, is a scriptural foundation for the manner with which the Christian school administrator deals with student, parent, personnel, and board problems which confront him.

The limited scope of this paper prohibits a detailed evaluation of all cases contributing to an understanding of the scope of the Fourteenth Amendment within the public schools. However, even a cursory look will provide adequate guidelines for the establishment of sound school policies. In any study of the Fourteenth Amendment, it is necessary to understand the legal position of the school in controlling and discipling of pupils.

In Jewish culture, the education of children was the responsibility of the parents.[60] The principle held true in the Roman culture

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[60]See Deut. 6:7.

and was perpetuated through the impact of Roman law upon English and subsequently American jurisprudence. Under Roman law, the parents could select a tutor to teach their child. This tutor was considered by law to be in loco parentis, or "in the place of parents." In writing on this subject, Nolte points out that:

> The role of the teacher is that of mentor, and the in loco parentis relationship limits his rights to control the child to the area of his educational endeavors. The parent still retains the right to determine who, if anyone, shall treat the child medically, what religious training, if any, he shall have, and whether or not he shall be examined mentally.[61]

The courts have consistently upheld the right of the principles, school boards, and teachers to discipline students on the basis of this principle and have held that students must obey. Although there has not been any case brought before the Court either challenging or affirming such a stand, the mere fact that no such case has been entertained by the Court would seem to support this view.

A problem quickly arises when the Fourteenth Amendment is thrust into the picture. As the courts have interpreted the due process clause in the last ten years, each school must reevaluate its understanding of in loco parentis. It must now be reconciled with the student's rights under the law. Prior to 1967, the Court had hinted that the due process clause was not a protection of only adult rights.[62] Then, in 1967, the Court, in the Gault case, delineated what was

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[61]Nolte, Guide to School Law, p. 87.

[62]See Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962); Kent v. U.S., 383 U.S. 541 (1966).

involved in due process. In Gault, the Court found that the prevailing philosophy that juveniles have no rights was repugnant to the Constitution. They further held that juveniles were entitled to the same due process rights as adults.[63] Nolte, in his analysis of this case, said:

> The following rights seem guaranteed to the student under the Gault decision:
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> 1. The right to be informed regarding his right to counsel, and the privilege against self-incrimination;
> 2. The right to have someone represent his interests in the early stages of investigation;
> 3. The right to written charges, a fair hearing, and a record of the proceedings; and
> 4. The right to appeal.
>
> When the student chooses to remain silent, the principal or teacher must not infer guilt from the student's silence, nor may the student be punished for exercising his right to avoid self-incrimination.[64]

Thus, it was Gault that set the stage for the landmark case on student rights, Tinker v. DesMoines Community School District. This case came about as a result of a protest by students against the hostilities in Vietnam. Three students attending schools in the community of DesMoines wore black armbands to publicize objections to the Vietnam conflict and to indicate their support of a truce and a peaceful settlement of the dispute. The principals had heard of the impending demonstration and had adopted a policy against the wearing of armbands, in an attempt to forestall any possible confrontation of opposing elements due to the inflamatory nature of the issue among the student body. The students wore the armbands and were suspended from school. The fathers

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[63] In re Gault, 387 U.S. 1 (1967).

[64] Nolte, Guide to School Law, pp. 73, 74.

of the students filed suit in the United States District Court questioning the constitutionality of the action taken by the principles.

On appeal, the Supreme Court, in addressing itself to the question, said in part: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[65] In support of this position, Mr. Justice Fortas quoted from West Virginia v. Barnette in which the Court had held that under the First Amendment students in public schools could not be compelled to salute the flag. The portion quoted indicated the stand of the Court by saying:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. 319 U.S. at 637, 87 L.Ed. at 1637, 147 A.L.R. 674.[66]

To the Court, the major issue was the collision between students' exercise of their First Amendment rights and rules established by school authorities. In this case, the Court held that fear of possible confrontation and disturbance on the school campus was not sufficient reason to deny the students the right to publicly express their sentiments. Said the Court:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

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[65] Tinker v. DesMoines Community School District, 393 U.S. 503, 21 L.Ed.2d 731 (1968).

[66] Id. at 738.

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the luchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. . . and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
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> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more that a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in of the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. Burnside v. Byars, supra, at 749.[67]

As far as the Court was concerned,

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[68]

The basis for the determination of proper discipline on the part of school officials, as a result of Tinker, is to question whether the action of the students materially or substantially interfered with or would interfere with the requirements of appropriate discipline in the operation of the school without infringing upon the rights of others.[69]

While Mr. Justice Stewart, in separate opinion, concurred with the decision of the Court, he said:

> I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court

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[67] Id. at 739. [68] Id. at 740. [69] Id. at 741.

> decided otherwise just last Term in Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child--like someone in a captive audience--is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[70]

The Court's decision in Tinker indeed opened Pandora's box and ushered in a new era of court control of education within the public school system. Should the courts begin to apply the public function doctrine to the Christian schools, the same criteria of discipline would then prevail there. As Mr. Justice Black observed in his dissenting opinion in Tinker: "The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools' in the United States is in ultimate effect transferred to the Supreme Court." (Footnote omitted.)[71]

Before pursuing the aftermath of the Tinker decision, it would be well to consider further the dissent of Mr. Justice Black in order to evaluate the results of Tinker in the light of his observations, as well as those of the majority decision. Mr. Justice Black said in pertinent part:

> The schools of this nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. . . . School discipline, like parental discipline, is an integral and important part of training our children to be good citizens--to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed

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[70] Id. at 742. [71] Id. at 743.

> in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the schools controlling them. . . . This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school systems to public school students. I dissent. (Emphasis added.)[72]

After Tinker, the federal judiciary was deluged with cases requesting that student rights to freedom of expression be upheld. The guidelines as established by the Tinker test were to first determine if a student had been exercising his or her freedom of expression and, if so, then scrutinize the reasonableness of the restriction applied to denying that expression. Now, as never before, any student attacking a restriction has a much better chance of establishing a case against the school than he did prior to Tinker. The burden of proof now rests with

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[72] Id. at 748, 749.

the school, to establish that any action would materially or substantially interfere with the educational process, rather than upon the student, to establish that the regulation in question is arbitrary, capricious, or unreasonable.

The increase of the courts' vigilance in overseeing the protection of the welfare and freedom of minors to express themselves has been expanded to other areas of Fourteenth Amendment rights, such as questions of free exercise of religion, corporal punishment, suspension, and expulsion. Through these areas the courts have almost universally upheld students when their rights were being violated.

In a New Hampshire case concerning the right of parents to enforce their religious beliefs in the education of their child, the courts found that the child's education was of more importance. The parents had requested the school board of the Jaffrey-Ridge School District to excuse their children from classes which utilized audiovisuals and those which taught music or health. They claimed it was their belief that participation in such activities was sinful and worldly. The courts at both the state and federal level ruled that the state's interest in providing the highest quality education was more substantial than the parents' interest in molding their children's beliefs. Theoretically, it would seem that the judicial precedent here is that the child's benefit as prescribed by the state would be more important than the secondhand beliefs of the parents, teachers, or school boards.[73] While this case took place prior to Whisner, it is illustrative of the

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[73]Davis v. Page, 385 F.Supp. 395 (D.N.H. 1974).

attitude of the courts in following the reasoning of Tinker--that the rights and benefits of the student are to be held above those who heretofore have been responsible for his education.

On the question of suspensions and expulsions, the Court held in the case of Goss v. Lopez that:

> . . .Students facing temporary suspension have interest qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. . . .
>
> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel.
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> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.[74]

The basic reasoning of the Court in setting forth the foregoing procedure for the handling of suspensions or expulsions is as follows:

> A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of the state and local governments," Brown v. Board of Education, 347 U.S. 483, 493, 98 L.Ed. 873, 74 S.Ct. 686 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. (Footnote omitted.)[75]

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[74]Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 (1975).

[75]Id. at 736.

Here again is another progeny of the Tinker decision. As Mr. Justice Powell noted in writing the minority opinion:

> The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension. (Footnote omitted.)[76]

Justice Powell further stated:

> If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system. If the Court perceives a rational and analytically sound distinction between the discretionary decision by school authorities to suspend a pupil for a brief period, and the types of discretionary school decisions described above, it would be prudent to articulate it in today's opinion. Otherwise, the federal courts should prepare themselves for a vast new role in society.[77]

The prophetic utterances of both Mr. Justice Black in Tinker and of Mr. Justice Powell in Goss have come true. In reviewing the host of cases dealing with student rights, we find that indeed the courts have brought upon themselves an overwhelming deluge of litigation.[78] However, the Court may have realized that a clarification of its stand would be in order.

In 1973, in the case of San Antonio Independent School Dist. v. Rodriguez, the Court held that education is not a right protected by the

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[76] Id. at 741. [77] Id. at 749.

[78] See Hagopian v. Knowlton, 470 F.2d 201 (CA 2 1972); Vought v. Van Buren Public Schools, 306 F.Supp. 1388 (ED Mich. 1969); Fielder v.

Constitution.[79] This is a shift in their position that education is a fundamental interest upon which most of the student rights cases have been built. Now such cases are placing more emphasis upon the fact of compulsory education laws as the basis of protection of individual rights rather than the Constitution which is silent on the question of education. The significance here is that the Court may begin looking at education cases with the idea of placing more emphasis once again upon state control.

In a more recent case, dealing with the question of corporal punishment, the Court went so far as to spell out its definition of the Eighth Amendment cruel and unusual punishment clause, substantive due process, and procedural due process.[80] The significance of this case is to be found in the care with which the Court defined and clarified its position with careful attention that this case did not further open the breach in Supreme Court involvement in education first breached by Tinker.

The Supreme Court, in memorandum, upheld the findings of the lower court. Said Mr. Justice Morgan for the Court: "The Eighth

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Board of Education of School District of Winnebago, Neb., 346 F.Supp. 722 (Neb. 1972); Sullivan v. Houston Ind. School Dist., 475 F.2d 1071 (CA 5), cert. denied, 414 U.S. 1032, 38 L.Ed.2d 323 (1973); Sterzing v. Fort Bend, Ind. School Dist., 496 F.2d 92 (5th Cir. 1974); Bramlett v. Wilson, 495 F.2d 714 (8th Cir. 1974); Sims v. Waln, 388 F.Supp. 543 (S.D. Ohio 1974); Gonyaw v. Gray, 361 F.Supp. 366 (D.Vt. 1973); Baker v. Owen, 395 F.Supp. 294 (M.D.N.C. 1975), aff'd --U.S.--, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); Glaser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972); Ware v. Estes, 328 F.Supp. 657 (N.D. Tex. 1971); Roberts v. Way, 398 F.Supp. 856 (D.Vt. 1975); et al.

[79]San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973).

[80]Ingraham v. Wright, supra.

Amendment was intended to be applied only to punishment invoked as a sanction for criminal conduct."[81] The Court, in answering the allegation of violation of substantive due process, upheld the district court's finding that:

> The evidence has not shown that corporal punishment in concept, or as authorized by the school board, or as applied throughout the school system, is arbitrary, capricious, or wholly unrelated to the legitimate state purpose of determining its educational policy. The plaintiffs' right to substantive due process is "a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calculated to correct it. Sims v. Board of Education, supra, at 684." Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation.
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> We emphasize that it is not this court's duty to judge the wisdom of particular school regulations governing matters of internal discipline. Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws. Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children. We do not here overrule it. (Footnotes omitted.)[82]

The Court further clarified its position in the Ingraham case by setting the record straight on procedural due process and corporal punishment. The Court held that contrary to the prescribed procedure set forth in suspension cases (Goss v. Lopez, supra), corporal punishment did not involve damage to reputation, was not a deprivation of property interest, nor was it a denial of a claim to education; therefore, corporal punishment was a much less serious event in the child's life and

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[81] Id. at 913. [82] Id. at 916-17.

consequently not subject to procedural regulations. Said the Court in conclusion:

> It seems to us that the value of corporal punishment would be severely diluted by elaborate procedural process imposed by this court. To require, for example, a published schedule of infractions for which corporal punishment is authorized, would serve to remove a valid judgmental aspect from a decision which should property be left to the experienced administrator. Likewise, a hearing procedure could effectively undermine the utility of corporal punishment for the administrator who probably has little time under present procedures to handle all the disciplinary problems which beset him or her. "[T]o hold that the relationship between parents, pupils, and school officials must be conducted in an adverse atmosphere and according to procedural rules by which we are accustomed in a court of law would hardly best serve the interest of any of those involved. Whatley v. Pike County Board of Education, supra. The likelihood of the abuse of corporal punishment is minimized by the participation of parents and school boards in school affairs, and by the availability of civil and criminal sanctions against teachers who exceed the limits of moderation. In any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing. Gonyaw v. Gray, supra, at 371."
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> In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough on a constitutional level to justify the time and effort which would have to be expended by the school in adhering to these procedures or to justify further interference by federal courts into the internal affairs of public schools. If a paddling of a school child subjects him to a "grievous loss" sufficient to require constitutional procedural safeguards under the Fourteenth Amendment, then conceivably a teacher's decision to keep a disobedient child after school or to give a child a failing grade in a course would inflict just as grievous a loss and would require procedures which meet constitutional standards. We do not interpret the due process clause of the Fourteenth Amendment so broadly. In so holding, we are mindful of the oft-quoted statement made by Justice Fortas in Eppersen v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which he asserted:
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> "Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint. . . . By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and

sharply implicate basic constitutional values." (Footnotes omitted.)[83]

In reviewing the preceding rights cases, many a Christian school administrator would shrink in horror at the very thought of being held accountable to the students, parents, and the courts for his everyday decisions in the normal operation of the school. However, these cited cases but scratch the surface of the potential litigation confronting the Christian school movement should the public function doctrine become an enforced reality. At this time it is not, and the restrictions of the Fourteenth Amendment are applicable only to the public schools.

It should not go unmentioned, however, that the question of individual rights extends much further than the areas covered here. The progeny of Tinker includes litigation in the following enumerated areas:

(1) Student dress and grooming;

(2) Censorship of school newspapers;

(3) Testing-achievement, aptitude and intelligence;

(4) Grading and graduation requirements;

(5) Admission requirements;

(6) Extracurricular activities;

(7) Search and seizure; and

(8) Rights of assembly and association.[84]

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[83] Id. at 919.

[84] See Melton v. Young, 328 F.Supp. 88 (1971); Ferrell v. Dallas Independent School District, 392 F.2d 697 (1967); Meyers v. Arcata Union High School District, 269 C.A.2d 549 (1969); Lemon v. Bossier Parish School Board, 444 F.2d 1400 (1971); Serna v. Portales Municipal Schools, 351 F.Supp. 1279 (D.C.N.M. 1972); Griggs v. Duke Power Company, 401 U.S. 424 (1971); Meredith v. Fair, 305 F.2d 343 (5th Cir. 1961); Mitchell v. Louisiana High School Athletic Assn., 430 F.2d 1155 (5th Cir. 1970); et al.

Further, individual rights problems extend into the area of teachers' rights and involve a multitude of cases ranging from academic freedom to tenure.

Obviously, this is one area of law that many would like to ignore. Discussion of this issue in this paper is designed to awaken Christian school administrators and boards to the existence of the leviathan that is the public function doctrine. Yet, Christian schools must develop interpersonal relationships that are considerate of the individuality of their constituency. The guidelines of the court on corporal punishment, for example, would be beneficial in establishing a sound school policy. Should a school use corporal punishment, it must be reasonable and fit the offense and it must not be administered in anger or with malice.[85] If the administration and boards of the Christian schools across the country establish sound and fair policies for the operation of their schools, they will be, in theory at least, policing themselves and will avoid the necessity of policing by the state.

Public Funds and Private Education

State and federal aid to private sectarian institutions of education has become an issue between various leaders and organizations within the Christian school movement. A number of factors would seem to poignantly proclaim the advantages of such aid. They include the need to: (1) defray the increasing cost of educational equipment--textbooks, audiovisual equipment, et cetera, (2) provide a livable salary for

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[85] See Ware v. Estes, supra; Glaser v. Marietta, supra; Ingraham v. Wright, supra.

employees in order to attract and retain quality personnel, (3) offset the high cost of building and maintaining an educational plant to house and facilitate the desired curriculum, (4) attract clientele without overburdening them with the continual prospect of increasing tuition. Each of these expressed needs would certainly make additional aid from state or federal agencies tempting if not desirable.

From the prospective of increasing state and federal control over Christian schools, however, the aspect of aid becomes undesirable, to say the least. The question raised is one of constitutionality. Does the First Amendment allow public aid to religious schools and can a Christian school accept government aid without being asked to give up its sectarian distinctions?

First Amendment and Federal Aid

The question is not new nor are the answers definite. Daniel Callahan, in writing in Federal Aid and Catholic Schools, writes:

> We now believe that the legal question [constitutionality] is only one of many, no doubt still of central importance but surrounded by such a tangle of social, cultural, historical and educational issues that it can no longer be considered in isolation.
>
> The question we now put to ourselves is: How can one find a path through this briar patch? And how, before one starts looking, can one persuade the other members of the search party to leave their traditional weapons outside: sabers (for we like to slash one another); spiked maces (for we enjoy at times brute force); shibboleths (which can be flung at will); scaling ladders and hot lead (the former to surmount any "wall of separation," the latter to repel those who try).
>
> The imagery, I'm afraid, is not overdone. For well over a hundred years Americans have struggled over the place of the religious school in the American educational system. Time and again, the courts have had to render decisions on this or that point of contention. One generation after another has found something to

argue about, and ours is no exception.[86]

The "wall of separation" to which Callahan referred was that suggested by Thomas Jefferson, the author of the First Amendment, who intended that it would indeed provide a separating wall between the church and the state.

Some political scientists have argued that the First Amendment's provision against an establishment of religion was simply intended to prevent one particular religion being set up as the official national or state religion.[87] Others, however, argue that the First Amendment is intended to keep the United States Government completely neutral in all matters involving any church.

Speculation may be interesting, but it must be remembered, as pointed out previously, that the Constitution means what the Supreme Court says it means at any given point. In 1947, the Supreme Court, in the case of Everson v. Board of Education, declared that: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[88]

However, in the Everson case, the Supreme Court went on to say that a New Jersey law allowing the use of public school buses to transport students to and from parochial schools was constitutional. It was

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[86]Virgil C. Blum et al., Federal Aid and Catholic Schools, Ed. Daniel Callahan (Boston: Helicon Press Inc., 1964), pp. 9-10.

[87]England and many European countries had such official state churches at the time our Constitution was written.

[88]Everson v. Bd. of Educ., 330 U.S. 1, 91 L.Ed. 711 (1947).

here that the Court found that such a law was designed to be of benefit to the children, rather than directly to the church-supported schools or religion. The latter, held the Court, would violate the First Amendment but aid to students did not.

The American tradition, however, has been to maintain a stance of church-state separation as can be seen demonstrated in the Court's decisions regarding prayer, Bible reading, and the dismissed time/released time questions.[89] This tradition would become subject to serious erosion once public funds were directed to Christian schools. Even if absolute separation of church and state were not what the Constitution required specifically, there must be consideration of the problems presented by the opening of the way for federal funds--contributed by all the people, regardless of religious faith--to be used by schools in which a particular religious faith is incorporated into the curriculum. An editorial which appeared in the March 20, 1961 edition of New Republic addressed these problems when it said in part:

> Private schools that draw on public funds might be considered public to the extent of being required, as the state is, to admit pupils without regard to race or religion and conceivably to offer either no or all religious teachings. This is of course preposterous. But it denotes the tenacity with which the law holds the state to its equalitarian mission in all its activities. The incongruity of the result just supposed is itself an indication of the revolution that would be worked in our system by involving the state with parochial schools. No one can foresee all the wide-ranging

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[89]See Engle v. Vitale, 370 U.S. 421, 8 L.Ed.2d 601 (1962); School District of Abington Twp. v. Schempp and Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 620 (1963); Illinois ex rel. McCollum v. Bd. of Education, 333 U.S. 192 (1966); Zorach v. Clauson, 343 U.S. 306 (1952).

adjustments that would be necessitated were the state-church balance to be so violently disturbed.[90]

The Court has repeatedly held that the First Amendment bars the granting of public funds for any activity which would in any way promote the establishment of religion.

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade the citadel, whether its purpose or effect be to aid or oppose, to advance or to retard.[91]

Fourteenth Amendment and Federal Aid

Another constitutional question has been raised in regard to equal protection and federal aid to Christian education. Can the government exclude the students attending Christian schools from receiving public funds without denying them equal protection of the law? Would not such exclusion constitute unfair discrimination?

Many who would support aid to private religious schools maintain that the issue is one of aiding education rather than religion. The parents of children attending Christian schools are subjected to a double burden in the nation's efforts in education. All, of course, must pay taxes to support the public schools, and they must pay their children's tuition for Christian schooling as well.

Those opposed to federal aid to nonpublic schools argue that charges of discrimination and double taxation are fallacious. Many

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[90]"Parochial and Public," New Republic, Editorial, 144:3-5 (March 20, 1961), p. 5.

[91]School Dist. of Abington Twp. v. Schempp and Murray v. Curlett, supra, at 628.

unmarried people, married couples without children, and elderly citizens who do not make use of the public schools must nevertheless pay taxes to support them. They should do so because the national state interest requires that every child be entitled to a free public education. They further argue that those who do patronize Christian and other nonpublic schools do not have to do so. The public schools are available to all parents who choose to use them. If they choose otherwise, it is then their own choice and any additional expenses incurred become their freely assumed responsibility.

The battle lines have thus been drawn and an easy solution to the question of the use of public funds for Christian education is, at this point, still not within sight.

Public Function, Child Benefit, and Christian Schools

The strongest argument in favor of public aid to nonpublic education is inextricably enmeshed with the doctrine of public function. As was pointed out in the discussion of the due process clause of the Fourteenth Amendment,[92] the public function doctrine has the potential of opening the Christian school movement to accountability for the individual rights of both students and teachers. Therefore, it becomes necessary to weigh the <u>costs</u> of espousing use of federal or state funds for Christian schools.

The Court has maintained that the state's interest can be served through attendance at nonpublic schools. It would then naturally follow

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[92]See Public Function and Fourteenth Amendment Rights, <u>ante</u>, at p. 44.

that these same nonpublic schools do perform a public function through teaching secular subjects which, in the opinion of the state, are necessary for the perpetration of productive citizenship. The conclusion of this line of logic results in the premise that nonpublic schools should therefore not be excluded from public benefits.

The Catholics, having been involved in parochial education far longer than any Protestant groups in our country, actively pursue the public function argument in their support of federal aid to parochial education. In his argument for freedom and equality, Virgil C. Blum writes:

> To this writer, therefore, the central issue in the federal aid-to-education debate is freedom of thought and freedom of belief in the pursuit of truth. Constitutional rights, in other words, are personal. The right to be free in thought and belief, and to share equally in federal aid to education is a personal right; it does not inhere in schools, churches or synagogues. Here as in the segregation cases, it is the individual child who is entitled to be treated equally before the law. . . .
>
> [T]oday the state is primarily, if not exclusively, interested in the education of children in secular subjects which deal only with things of <u>this</u> world.
>
> Moreover, it is because of the state's proper interest in the secular education of children that the Supreme Court has on several occasions pointed out that the education of children in secular subjects in church-related schools serves a public purpose. . . .
>
> The education of children in reading, 'riting, and 'rithmetic serves a public purpose. And this public purpose is achieved whether the subjects are taught by a Jewish rabbi, a Lutheran minister or a Catholic nun. Nor is the secular character of these and other secular subjects changed when taught in a Jewish, Lutheran, or Catholic school. Further, a religious permeation of secular subjects does not change their essentially secular character.
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> On the other hand, neutrality in the classroom is impossible. This is true of the physical and life sciences, but it is particularly true of the humanities and the social sciences. There is hardly a subject taught that does not directly or indirectly give rise to the fundamental questions of life. Is there a God? Was Christ

> divine? What is the nature of man? Right or wrong--with reference to what? The freedom and equality of man--why? Justice or injustice--with reference to what norm? What is man's moral responsibility, if any? These questions are religious, or basically so. And the intelligent teacher in interpreting his subject matter cannot avoid them. Consciously or subconsciously, he inculcates either his own religious values or the religious value commitment of his school.
>
> The answers which teachers give to these and other questions establish the religious values of their classrooms and of their school. These values may be Protestant, Catholic, Jewish or secularist.[93]

The opposition to federal and/or state aid to nonpublic education relies most heavily upon the establishment clause of the First Amendment for its contention that all aid to religiously oriented private schools is prohibited. However, even Justice William O. Douglas, in writing the opinion of the Court in the Zorach case, decried this strict interpretation. Justice Douglas said in part:

> The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly.[94]

The conclusion may easily be drawn from this definition of the First Amendment that the government may enact legislation which would serve its interests even if the enacted legislation did incidentally bring benefit to religion.

The concept of incidentally aiding parochial schools had been dealt with prior to the Zorach case. In 1930, a Louisiana law, which

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[93]Blum et al., Federal Aid and Catholic Schools, pp. 44-46.

[94]Zorach v. Clauson, supra at 308.

provided for the loan of textbooks to church-related school children, was attacked on the basis that it was in violation of the establishment clause of the First Amendment. Chief Justice Charles E. Hughes, in rejecting this contention, reasoned:

> The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with matters of exclusively private concern. Its interest is education broadly; its methods, comprehensive. Individual interests are aided only as the common interest is safeguarded. (Emphasis added.)[95]

If, then, the government were to enact legislation, in keeping with its interest, for a public purpose, any incidental benefits accrued to a religion are irrelevant to the question of its constitutionality. In other words, the federal and state governments cannot be rendered incapacitated in the performance of their cuty to provide for the general welfare of the people due to incidental benefits to religion. Herein lies the basis of the child benefit theory.

The development of the child benefit theory may be traced from the Cochran case in 1930 to Wolman v. Walter in 1977. However, of greatest benefit to the Christian schools today is the current posture of the Court on the issue. Therefore, the focus here will be based upon the recent ruling of the Court in the Wolman case. In Wolman, the Court carefully scrutinized its previous rulings on the issue of the use of public funds to aid sectarian education to arrive at the following decisions.

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[95] Cochran v. Louisiana St. Bd. of Educ., 281 U.S. 370, 74 L.Ed. 913 (1930).

Three-Part Test as Mode of Analysis

In Wolman, the Court stated the basis for analysis of cases dealing with "the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, . . . on state aid to pupils in church-related elementary and secondary schools."[96] In drawing upon the Court's previous decisions, Mr. Justice Blackmun, in delivering the opinion of the Court, said: ". . .a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."[97] The Court, in examining Ohio's aid statute, found no difficulty with the secular purpose of the bill. The remaining two prongs of the three-part test, the effect and entanglement aspects, were applied individually to each segment of the bill under scrutiny. In quoting from Comm. for Pub. Ed. v. Nyquist, 413 U.S., at 761 (1973), Mr. Justice Blackmun stated, ". . .the Court's numerous precedents 'have become firmly rooted,' . . . and now provide substantial guidance."[98]

Textbooks

The question of textbook loans was not highly debatable due to the Court's rulings on that topic in two relatively recent cases in which the loan of state textbooks was upheld as constitutional.[99] The

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[96]Wolman v. Walter, 97 S.Ct. 2593, 45 L.W. 4861 (1977).

[97]Id. at 4862. [98]Id. at 4863.

[99]See Bd. of Educ. v. Allen, supra.

Court felt that the Ohio statute provided adequate protections against abuse.[100]

Testing and Scoring

On the issue of the provision of standardized tests and scoring services [3317.06 (J)], the Court held:

> There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. . . . The State may require that schools that are utilized to fulfill the State's compulsory education requirements meet certain standards of instruction, Allen, 392 U.S., at 245-246, and n. 7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. . . . Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. . . . [and], the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement.[101]

Diagnostic Services

These services were defined as being speech, hearing, and psychological diagnosis. In a previous case, the Court had held that such

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[100]Section 3317.06 authorizes the expenditure of funds: "(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, 'textbook' means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends."

[101]Wolman v. Walter, supra at 4864.

health services do not have the primary effect of aiding religion. Said the Court:

> Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. (Emphasis added.)[102]

Previously, in Meek, the Court had found similar services to be unconstitutional due to the fact that in the Pennsylvania statute in question, in order to insure neutrality on the part of the personnel, the State would have been required to engage in continual supervision on the premises of the nonpublic school.[103] In quoting from Meek, the Court in Wolman said:

> The Court in Meek explicitly stated, however, that the provision of diagnostic speech and hearing services by Pennsylvania seemed "to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." . . . The provision of such services was invalidated only because it was found unseverable from the unconstitutional portions of the statute.[104]

In Wolman, the Court stipulated that these services were to be performed by employees of the local school boards and that treatment of any defect discovered "would take place off the nonpublic school premises."[105] They therefore concluded that this would substantially remove

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[102]Lemon v. Kurtzman, 403 U.S. 602, 34 L.Ed.2d 295 (1971).

[103]Meek v. Pittenger, 421 U.S. 349 (1975), at 372. See also Public Funds for Public Schools v. Marburger, 358 F.Supp. 29, 40 (NJ 1973), aff'd 417 U.S. 961 (1974).

[104]Wolman v. Walter, supra at 4864.

[105]Ibid.

the objection they had found in the Pennsylvania statute, in that Ohio's provision for these services would not "create an impermissible risk of fostering of ideological views"[106] nor would it require excessive supervision by the State, thus making Ohio's bill constitutional.

Therapeutic Services

> Sections 3317.06 (G), (H), (I) and (K) authorize expenditures of funds for certain therapeutic, guidance, and remedial services for students who have been identified as having a need for specialized attention. . . .
>
> Appellants concede that the provision of remedial, therapeutic, and guidance services in public schools, public centers, or mobile units is constitutional if both public and nonpublic school students are served simultaneously. . . .[107]

The District Court had stated that if these services were held only at locations which were "neither physically nor educationally identified with the functions of the nonpublic school," 417 F.Supp., at 1123, they were essentially being offered under circumstances which were on the face religiously neutral. The Supreme Court agreed. If such services were offered (1) at truly religiously neutral locations, and (2) occasionally served only sectarian pupils, but not exclusively, the dangers perceived by the Court in the Meek case are not a factor to cause their prohibition.[108] The Court concluded by saying: "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."[109]

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[106] Id. at 4865. [107] Ibid.

[108] Ibid. [109] Id. at 4866.

Instructional Materials and Equipment

Here the Ohio statute attempted to provide funds to purchase instructional materials and equipment and then loan this to the pupils or their parents when individually requested. The materials and equipment were to be of the same kind used in the local schools but of such a nature that they could not be utilized for religious purposes. It was further stipulated that the materials and equipment might be stored at the nonpublic school to expedite the lending process to the pupils.

The Court would not uphold the constitutionality of these services on the grounds that even though the loan was basically limited to equipment and materials which themselves were both considered secular and neutral, the effect of the loan would primarily be "providing a direct and substantial advancement of the sectarian enterprise."[110] Said the Court:

> In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.
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> Indeed, this conclusion is compelled by the Court's prior consideration of an analogous issue in Committee for Public Education v. Nyquist, 418 U.S. 756 (1973). There the Court considered, among others, a tuition reimbursement program whereby New York gave low income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of $50 to $100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in Everson v. Board of Education, 330 U.S. 1 (1947), and the book program in Allen, there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to insure that State financial aid supports only the former.'" 413 U.S., at 783, quoting Lemon v. Kurtzman, 403 U.S., at 613. The Court thus found that the

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110 Ibid.

> grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fareany better.[111]

Field Trips

This section also fell short of constitutional approval by the Court. Here, Section 3317.06 (L) of the Ohio Revised Code read: "To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district."[112] The District Court had found this feature of the Ohio statute constitutional on the basis of Everson. The Supreme Court, in this instance, did not agree. Here the Court ruled:

> In Everson the Court approved a system under which a New Jersey board of education reimbursed parents for the cost of sending their children to and from school, public or parochial, by public carrier. The Court analogized the reimbursement to situations where a municipal common carrier is ordered to carry all school children at a reduced rate, or where the police force is ordered to protect all children on their way to and from school. Id., at 17. The critical factors in these examples, as in the Everson reimbursement system, are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in Everson passed constitutional muster because the school did not determine how often the pupil traveled between home and school--every child must make one round trip every day--and because the travel was unrelated to any aspect of the curriculum.
>
> The Ohio situation is in sharp contrast. First, the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid. See Lemon v. Kurtzman, 403 U.S., at 621. Second, although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest

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[111] Ibid.

and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product. See Meek v. Pittenger, 421 U.S., at 366. In Lemon the Court stated:

"We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U.S., at 618.

Funding of field trips, therefore, must be treated as was the funding of maps and charts in Meek v. Pittenger, supra, the funding of buildings and tuition in Committee for Public Education v. Nyquist, supra, and the funding of teacher-prepared tests in Levitt v. Committee for Public Education; it must be declared an impermissible direct aid to sectarian education.

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement: . . .[113]

Evaluation

While the Wolman case will undoubtedly be considered a landmark decision--and rightfully so--there are several ramifications which should not be overlooked. First of all, the decision affects the provisions of the Ohio Revised Code, Sections 3317.06 (A-L) only.[114] All other similar programs of state aid to nonpublic education in other

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[113] Ibid.

[114] Sub-section (E) of the statute was uncontested by the appellants because it obviously was designed to provide funding for public health services. Wolman, supra, at 4864 n. 10 states: "Section 3317.06 authorizes the local school district to expend funds '(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.'"

states must meet the same three-pronged analysis of the Court if challenged or be compatible to the approved Ohio statute. In short, this does not give a blank check to the Christian school movement.

Philosophical disagreement with the findings of the Court majority is commonplace among state legislators across the country and opposition by such powerful lobbies as the American Civil Liberties Union (ACLU), Americans United for Separation of Church and State (AUSCS), National Education Association (NEA), and others will not wilt away into oblivion. The Justice sitting on the Supreme Court bench who exhibits the philosophical viewpoint of these avowed enemies to public aid for nonpublic education is Mr. Justice Brennan. In separate opinion in the Wolman case, Mr. Justice Brennan stated:

> I join Parts I, VII, and VIII of the Court's opinion, and the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of §§ 3317.06 (B), (C), and (L).
>
> I dissent, however, from Parts II, III, IV, V, and VI of the opinion and the affirmance of the District Court's judgment insofar as it sustained the constitutionality of §§ 3317.06 (A), (D), (F), (G), (H), (I), (J), and (K). The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "The [First] Amendment nullifies sophisticated as well as simple-minded. . ." attempts to avoid its prohibitions. Lane v. Wilson, 307 U.S. 268, 275 (1939), and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06 (B) and (C) which today are invalidated) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires, Everson v. Board of Education, 330 U.S. 1, 16 (1947). Its evaluation, even after deduction of the amount appropriate to finance §§ 3317.06 (B) and (C), compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion." Meek v. Pittenger, 421 U.S. 349, 373-385 (1975) (Brennan, J.,

concurring); Lemon v. Kurtzman, 403 U.S. 602, 640-642 (1971) (Douglas, J., concurring); Everson v. Board of Education, supra at 16.[115]

Second, it must be remembered that with public aid comes the potential for public control, for whoever pays the piper calls the tune. The question remains unanswered as to whether the state could, in effect, dangle the carrot only to threaten its withdrawal should the horse balk. Once nonpublic schools in Ohio have benefited from public aid, one might only surmise the economic devastation which would befall the private school sector should they lose the $87.00 per student biennium allocation made available to them by the Wolman decision.

Should the philosophy of Meek once again prevail in the Court, the cost of purchasing replacement texts--once provided by the state--would alone force an increase in tuitions which would potentially bring a chain reaction of a loss of students and a loss of revenue. In Meek, the Court said regarding private schools:

> The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." [Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)] (opinion of Brennan, J.)[116]

If once the Court can reverse itself on an issue in a matter of two years, it can happen again.[117] Should the Court interpret the above

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[115]Wolman v. Walter, supra at 4868.

[116]Meek v. Pittenger, supra at 366.

[117]Cf. Meek v. Pittenger, supra, and Wolman v. Walters, supra.

philosophy strictly, even the loan of textbooks to sectarian institutions would be in jeopardy, Cochran, Allen, and Wolman to the contrary.

Analysis of the Aid Question

In the final analysis, the issue of public aid for sectarian education is a question of interpretation. How strictly the Court at a given time interprets the meaning and intent of the First Amendment is the determinant factor. Is the establishment clause a high and inseparable wall never to be breached by either church or state? To quote Clarence Darrow in his argument in the Scopes case:

> The realm of religion. . .is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.[118]

Mr. Justice Stevens, in quoting Everson and drawing a conclusion compatible to that of Mr. Justice Brennan, said:

> I would adhere to the test enunciated for the Court by Mr. Justice Black: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and school books are all equally invalid. For all give aid to the school's educational mission, which at heart is religious. (Footnotes omitted.)[119]

On the other hand, does the establishment clause create "a wall which is a blurred, indistinct, and variable barrier depending on all the

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[118] Quoted by Mr. Justice Stevens in separate opinion, Wolman v. Walter, supra at 4870. Also see n. 1.

[119] Ibid.

circumstances of a particular relationship."?[120] Mr. Justice Powell raises this very question. His answer to the problem is, by far, a less strict construction of the First Amendment establishment clause. Says Mr. Justice Powell:

> At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes--or even of deep political divisions along religious lines--is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable.[121]

As has been demonstrated, there are two schools of thought which are currently represented by members of the Court. As to which will prevail no one knows, but it is safe to say that there is no security for the Christian school movement in man's judgments. It is the Bible which gives basis to law, not man. However, in reading the context of this paper, it becomes obvious that man has not learned that arbitrary judgments provide no basis for security. Dr. Francis Schaeffer has well said:

> Man has failed to build only from himself autonomously and to find a solid basis in nature for law, and we are left today with Oliver Wendell Holmes' "experience" and Frederick Moore Vinson's statement that nothing is more certain in modern society than that there are no absolutes. Law has only a variable content. Much modern law is not even based on precedent; that is, it does not necessarily hold fast to a continuity with the legal decisions of the past. Thus, within a wide range, the Constitution of the United

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[120] Lemon v. Kurtzman, supra at 614.

[121] Wolman v. Walter, supra at 4870.

> States can be made to say what the courts of the present want it to say--based on a court's decision as to what the court feels is sociologically helpful at the moment. At times this brings forth happy results, at least temporarily; but once the door is opened, anything can become law and the arbitrary judgments of men are king. Law is now freewheeling, and the courts not only interpret the laws which legislators have made, but make law. (Emphasis added.)[122]

IRS, Tax Credit, and Governmental Control of the Christian School

To a great extent, this section of the chapter is a continuation of the one preceding. It can be convincingly argued that the tax exempt status held by Christian schools is an indirect form of federal aid and therefore unallowable according to the First Amendment's establishment clause. Again, the result of any discussion of the issue would produce similar results--the courts must decide the outcome. However, the IRS question takes a slightly different twist. To date, there has not been a concentrated effort to attack this shelter for Christian schools in the Court. The established tax laws under § 501(c)(3) of the Internal Revenue Code provide that:

> An organization may qualify for exemption from Federal income tax if it is organized and operated exclusively for one or more of the following purposes:
>
> Charitable,
> Religious,
> Scientific,
> Testing for public safety,
> Literary, Educational, or
> Prevention of cruelty to children or animals. (Emphasis added.)[123]

Because many Christian schools are tax exempt under a sponsoring or parent church, it would pose a major problem for enemies of sectarian

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[122]Schaeffer, How Should We Then Live, p. 218.

[123]Int. Rev. Code of 1954, § 501(c)(3).

educational institutions; by attacking the tax exempt status of Christian schools, they would of necessity have to attack the tax exempt status of churches as well. At this time, the potential opposition from the churched taxpayers here in the United States is an effective hindrance to attempts to remove the tax exemption of religious organizations by those desiring a strict reading of the establishment clause.

While at this time the loss of tax exemption on the basis of the establishment clause is remote, it must be kept in mind that the power to tax is the power to control. The IRS has established a host of rules, regulations, and publications in a bureaucratic effort to determine who is and who is not required to file annual returns.

Forms, Forms, and More Forms

The discussion to follow is designed to acquaint Christian school administrators and boards with the application requirements established by the IRS to determine eligibility for exemption under § 501(c)(3) of the Internal Revenue Code. Each school desiring recognition for exemption purposes must first make application by filing Form 1023. As in all bureaucratic paperwork, there is an exception:

> These are churches, their integrated auxiliaries, and conventions or associations of churches, . . . These organizations are automatically exempt if they meet the requirements described in this chapter. However, if such an organization wants to establish its exemption with the Internal Revenue Service and receive a ruling or determination letter recognizing its exempt status, it should file Form 1023 with the District Director. Subordinate organizations (other than private foundations) included in an application for an original or supplemental group exemption letter need not file a separate Form 1023.[124]

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[124]IRS Publication 557, "How to Apply for Recognition of Exemption for an Organization," 1977 Edition, p. 4.

In short, any Christian school which functions as an integrated auxiliary of a sponsoring church need not file an application for exemption.[125] However, Christian schools which operate as an independent organization must file Form 1023 if they are to be recognized as a tax exempt organization.

Those who must file a Form 1023 should be aware that there is additional information which must be submitted with the application for exemption. The form requires that written statements should be included attesting to the following:

1) The organization is organized exclusively for and will be operated exclusively for one or more of the purposes (charitable, religious, etc.) specified earlier,

2) No part of its net earnings will inure to the benefit of private shareholders or individuals, and

3) It will not, as a substantial part of its activities, attempt to influence legislation, or participate to any extent in a political campaign for or against any candidate for public office.[126]

Further, the school must supply a copy of its articles of organization with the exemption application form. Publication 557, in part, says:

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[125]In order to qualify as an integrated auxiliary of a church, a school must be "either controlled by or associated with a church. . . . For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph. An organization is associated with a church. . .if it shares common religious bonds and convictions with that church." [CCH 1977 Stand. Fed. Tax Rep. § 5053A, Re. § 1.6033-2(g)(5)(iii), p. 6027-8.]

[126]IRS Publication 557, supra at 4.

> The articles of organization must limit the organization's purposes to one or more of those described in the first paragraph of this chapter, and must not expressly empower it to engage, otherwise than as an insubstantial part of its activities, in activities which are not in furtherance of one or more of those purposes.[127]

In addition to the above information, schools must provide a description of their proposed activities:

> Educational organizations. The term educational relates to the instruction or training of the individual for improving or developing their capabilities, or the instruction of the public on subjects useful to individuals and beneficial to the community. Advocacy of a particular position or viewpoint may be educational providing there is a sufficiently full and fair exposition of pertinent facts to permit an individual or the public to form an independent opinion or conclusion. Mere presentation of unsupported opinion is not educational.
>
> The following types of organizations may qualify as educational:
>
> 1) An organization, such as a primary or secondary school, . . . , that has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body in attendance at a place where the educational activities are regularly carried on; . . .
>
> If you are organized to conduct a school, submit full information regarding your tuition charges, number of faculty members, number of full and part-time students enrolled, courses of study and degrees conferred, together with a copy of your school catalog.
>
> Private educational institutions should also submit information to establish clearly that the institution does not and will not discriminate against applicants on the basis of race. Where a school has not clearly established that it is operating under a bona fide racially nondiscriminatory policy as to students, it must, in order to qualify for exemption, take affirmative steps to demonstrate that it will so operate in the future. The school must show that a racially non-discriminatory policy as to students has been adopted, has been made known to all racial segments of the community served by the school, and is being administered in good faith. (Emphasis added.)[128]

It has been adequately demonstrated by the foregoing discourse that any Christian school which is not an integrated auxiliary of an established

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[127] Ibid. [128] Id. at 9.

church faces a mountain of red tape in proving its tax exempt status.

In addition to the initial application for a letter of exemption, each school must file an annual information return to the IRS.

> Every organization exempt from Federal income tax under § 501(c) of the Code must file an annual information return on Form 990. . . except:
>
> 1) A church, an interchurch organization of local units of a church, . . . , or an integrated auxiliary of a church such as a men's or women's organization, religious school, mission society, or youth group; . . . .[129]

In keeping with the regulation regarding a school's policy of nondiscrimination, such schools who are exempt from filing form 990[130] must nonetheless annually file Form 5578, Annual Certification of Racial Nondiscrimination for a Private School Exempt from Federal Income Tax, in accordance with Rev. Proc. 75-50, 1975-2 C.B. 587.[131]

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[129] Id. at 3.

[130] According to CCH 1977 Stand. Fed. Tax Rep. § 5053A, Reg. § 1.6033-2(g)(5)(iv), the following school is not considered an integrated auxiliary: School B, an elementary grade school exempt from Federal income tax as an organization described in § 501(c)(3), is affiliated (within the meaning of paragraph (g)(5)(iii) of § 1.6033-2) with a church which is also exempt from Federal income tax as an organization described in § 501(c)(3). School B has a separate legal identity from that of the church. The school property, including buildings and grounds, is owned by the church. The school's supervisory and managerial personnel are appointed by church officials. The school's budget is prepared subject to approval by a church official responsible for the overall supervision of the school. The school's program corresponds with the public school program for the same grades and complies with State law requirements for public education. The principal activity of School B is education. Since this activity could serve as the basis for School B's exemption under § 501(c)(3) if it were not affiliated with a church, School B is not an integrated auxiliary of a church within the meaning of paragraph (g)(5) of § 1.6033-2. However, since School B is excluded from filing under § 1.6033-2(g)(1)(vii), it is not required to file an annual information return.

[131] See Form 5578 and instructions under Appendix B.

Further regulations stipulate that if a school or school district is considered "a central organization with affiliated subordinates under its control"[132] there is provision for application of a group exemption letter. However, to do this requires additional paperwork. According to Publication 557:

> If the central organization has previously obtained recognition of its own exemption, it must indicate its employer identification number, the date of the letter recognizing its exemption, and the Internal Revenue Office that issued it. It need not submit documents already submitted. However, if it has not already done so, it must submit a copy of any amendment to its governing instruments or internal regulations as well as any information regarding any change in its character, purposes, or methods of operation.
>
> Besides submitting information to obtain recognition of its own exemption, the central organization must submit the following information on behalf of the subordinates to be included in the group exemption letter:
>
> 1) A letter signed by a principal officer of the central organization setting forth or including as attachments
>
> a) Information verifying that the subordinates to be included in the group exemption letter are affiliated with the central organization; are subject to its general supervision or control; are eligible to qualify for exemption under the same paragraph of § 501(c) of the Code, though not necessarily the paragraph under which the central organization is exempt; and are not private foundations if the application for a group exemption letter involves § 501(c)(3) of the Code:
>
> b) A description of the principal purposes and activities of the subordinates;

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[132]Publication 557, supra at 3. Note also that "An incorporated subordinate unit of a central organization may be included in a group exemption letter if the central organization submits evidence to show that it maintains adequate control over the incorporated subordinate unit, and that the subordinate is otherwise qualified." [Ibid.] Also refer to Id. at 4 which states: "A group return on Form 990 may be filed by a central, parent, or like organization for two or more local organizations filing a separate Form 990. See the instructions for Form 990 for the conditions under which this procedure may be used." See Appendix B for IRS Forms 1023, 990, 5578, and instructions.

> c) A sample copy of a uniform governing instrument (such as charter or articles of association) or in its absence, copies of representative instruments;
>
> d) An affirmation to the effect that, to the best of the principal officer's knowledge, the subordinates are operating in accordance with the stated purposes;
>
> e) A statement that each subordinate to be included in the group exemption letter has furnished written authorization to the central organization;
>
> f) A list of subordinates to be included in the group exemption letter to which the Service had already issued an outstanding ruling or determination letter relating to exemption; and
>
> g) If the application for a group exemption letter involves § 501(c)(3) of the Code, an affirmation to the effect that, to the best of the principal officer's knowledge and belief, no subordinate to be included in the group exemption letter is a private foundation as defined in § 509(a) of the Code.
>
> 2) A list of the names, mailing addresses, and employer identification numbers of subordinates to be included in the group exemption letter.[133]

Because of the voluminous amount of paperwork involved for those schools not considered an integrated auxiliary of a church, it is sometimes easy to overlook areas of bureaucratic control.

First, in reviewing the accompanying statements to Form 1023, it should be noted that Christian schools may not become involved, as an organization, in a political campaign either in support of or against a candidate running for public office. [Ante. at 83.] The regulation further stipulates that a tax exempt organization may not actively attempt to influence legislation ". . .as a substantial part of its activities, ..."[134] Many Christian school administrators become paranoid regarding their school's involvement in desiring to influence

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[133] Ibid. [134] Id. at 4.

legislation on issues that are either detrimental or helpful to the school individually or to the Christian school movement in general. However, there are ways of utilizing constituent influence without jeopardizing a school's tax exempt status. Dr. Robert J. Billings received the following reply on this issue from Attorney Marion E. Harrison:

> In general, a pastor of a church which has a tax exempt status pursuant to § 501(c)(3) of the Internal Revenue Code himself may be quite active in politics without jeopardizing the tax exempt status of the church. The question often turns on the relationship of the pastor as an individual to the activities as pastor of the church. Stated another way, the pastor cannot by his own political activities involve the church of which he is pastor in political activities. . . . For example, it is not uncommon for a clergyman to serve on a finance committee or a campaign committee for a candidate for office, but he serves in his capacity as an individual citizen and does not involve directly the church or other 501(c)(3) institution with which he is connected.[135]

Mr. Harrison also addressed the question regarding the use of church or school stationery in writing letters expressing displeasure over issues. Said Mr. Harrison:

> Yes, a pastor or principal may write, however, there are particular fact situations which can lead to trouble--as for example, the writing on the stationery of a series of letters to the editor on political questions.[136]

Also of interest is the interpretation given by former Congressman John Conlan of Arizona, who said that schools may write to parents and associates of the school, encouraging them to support or discourage particular legislation and/or candidates, since it cannot be construed as being a substantial part of the school's activities. The problem

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[135]Robert J. Billings, ed., "The IRS and the Christian Schools Political Involvement," Christian School Alert (November, 1977).

[136]Ibid.

would come if the school were to place the letter in a newspaper or other publication accessible to the general public.[137]

In short, school personnel may freely become involved as private citizens in political issues and in support of candidates for public office provided the involvement does not in any way implicate the school. Further, informing the school's constituents on issues of interest to the school and its family, and asking their support of these issues, is an acceptable method of indirectly influencing legislation favorably for the local Christian school or the Christian school movement at large.

The second issue which needs additional evaluation is the exercise of control on the part of the IRS over the application and admissions procedures of Christian schools. In the late 1950s and early 1960s, it appeared to those involved with the forced desegregation of public schools in the southern states that there was an abandonment of the public schools, for rapidly growing segregation academies, by the middle class white population. In order to reverse the trend and to force compliance of nondiscriminatory practices on the part of nonpublic schools, the government approached the problem from several directions.

At the college and university level, the tack was to withhold federal funds, both from the school and from its students, should the schools be so bold as to resist. Of course, the very fact that these schools received direct federal aid placed them in the position of

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[137]John Conlon, Address delivered at the Western Association of Christian School Administrators' Conference, Pacific Grove, California, 10 February 1978.

accountability to the Fourteenth Amendment due process and equal protection clauses. The majority of segregated private institutions of higher learning quickly fell into line.

On the other hand, private schools at the elementary and secondary levels who were not eligible for federal funds posed a different problem. Some thought of turning to the public function doctrine established in the Marsh and Evans cases (1940 and 1966). However, it was felt that in private schools outside the South, the

> . . .need for imposing the requirements of equal protection on private schools is far from pressing, for two reasons. . .most of these schools and virtually all those which are particularly sought after because of their reputation have shown little disposition to exclude Negroes. Furthermore, the interest of most Negroes in private education is now indeed academic, because high costs erect a barrier nearly as severe as the racial barrier. Substantial integration in private education will have to wait until desegregation in employment and in public education provides the means for Negroes to attain higher economic status.[138]

Rather than pursuing the public function line of reasoning, the government chose other avenues to force nondiscriminatory practices upon private schools.

In July of 1973, a United States district court judge ordered two private schools in Virginia to end their practice of segregation in admissions. The basis for justifying government intervention, held the judge, was the provision of the 1866 Civil Rights Law which held that it was a universal right to "make and enforce contracts."[139] Neither of

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[138]Hogan, The Schools, the Courts, and the Public Interest, p. 19.

[139]Ibid., pp. 19-20. See also Civil Rights Act of 1866, 42 U.S.C. § 1981.

the two schools received either direct federal aid or indirect aid through tax exemption since both were proprietory schools. The implications of this action by the court are both broad and far reaching in relation to Christian education. At what point may refusal to hire teachers who are homosexuals, or teachers who do not hold the doctrinal creed of the school, or denial of admission on the basis of faith, be declared by the courts to be acts of discrimination? No one knows the answers. However, the potentials are there.

The other area of control instituted by government is through the agency of the Internal Revenue Service. As already discussed, the IRS requires annual declarations by private schools as to their compliance with nondiscriminatory policies in both applications and admissions. The posed threat for noncompliance is withdrawal of the letter of exemption. While there has not been a trial case at the elementary or secondary level as yet, this method was used to force Bob Jones University to integrate.

Bob Jones University, which traditionally had denied admissions to Negroes on the basis of religious beliefs, was notified of the intent of the IRS to revoke the University's tax exempt status qualification letter. The IRS further stipulated that it was withdrawing advance assurance to the University's contributors that their donations to Bob Jones University would be considered charitable contributions and therefore deductible for the donors under 26 USCS § 170(c)(2). The University filed for injunctive relief claiming that the action of the IRS was unlawful and would violate the University's First Amendment due process and equal protection rights. The district court granted a

preliminary injunction against the Service; however, the United States Court of Appeals reversed the lower court's decision, holding that the suit was barred by the Anti-Injunction Act. The Supreme Court on certiorari affirmed the decision of the Court of Appeals.

The Court, in reviewing the case, set down the following facts:

> Petitioner refers to itself as "the world's most unusual university." Founded in 1927 and now located in Greenville, South Carolina, the University is devoted to the teaching and propagation of its fundamentalist religious beliefs. All classes commence and close with prayer, and courses in religion are compulsory. Students and faculty are screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them. One of these beliefs is that God intended segregation of the races and that the Scriptures forbid interracial marriage. Accordingly, petitioner refuses to admit Negroes as students. On pain of expulsion students are prohibited from interracial dating, and petitioner believes that it would be impossible to enforce this prohibition absent the exclusion of Negroes.
>
> In 1942, the Service issued petitioner a ruling letter under § 101(6) of the Internal Revenue Code of 1939, the predecessor of § 501(c)(3). In 1970, however, the Service announced that it would no longer allow § 501(c)(3) status for private schools maintaining racially discriminatory admissions policies and that it would no longer treat contributions to such schools as tax deductible. See Rev Rul 71-447, 1971-2 Cum Bull 230. The service requested proof of a nondiscriminatory admissions policy from all such schools and warned that tax exempt ruling letters would be reviewed in light of the information provided. At the end of 1970, petitioner advised the Service that it did not admit Negroes, and in September 1971, further stated that it had no intention of altering this policy. The Commissioner of Internal Revenue therefore instructed the District Director to commence administrative procedures leading to the revocation of petitioner's § 501(c)(3) ruling letter.
>
> Petitioner brought these administrative proceedings to a halt by filing suit in the United States District Court for the District of South Carolina for preliminary and permanent injunctive relief preventing the Service from revoking or threatening to revoke petitioner's tax exempt status. Petitioner alleged irreparable injury in the form of substantial federal income tax liability and the loss of contributions. Petitioner asserted that the Service's threatened action was outside its lawful authority and would violate petitioner's rights to the free exercise of religion, to free association, and to due process and equal protection of the laws.

> The District Court rejected a motion to dismiss for lack of jurisdiction, and it preliminarily enjoined the Service from revoking or threatening to revoke petitioner's tax exempt status and from withdrawing advance assurance of the deductibility of contributions made to petitioner. Bob Jones University v. Connally, 341 F.Supp. 277 (SC 1971). The Court of Appeals for the Fourth Circuit reversed, with one judge dissenting. 472 F.2d 903, rehearing denied 476 F.2d 259 (1973). That court held that petitioner's suit was barred by the Anti-Injunction Act as interpreted by this Court in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 8 L.Ed.2d 292, 82 S.Ct. 1125 (1962).[140]

In setting forth the IRS position in the case, the Court stated:

> The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code. There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and, without indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to the protection of the revenues.[141]

As a footnote to the Service's interpretation of the Code, Mr. Justice Powell, in writing the opinion of the Court, noted:

> See Rev Rul 71-447, 1971-2 Cum Bull 230. The question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501(c)(3) in Green v. Connally, 330 F. Supp. 1150 (DC) (three-judge court), aff'd per curiam sub nom Coit v. Green, 404 U.S. 997, 30 L.Ed.2d 550, 92 S.Ct. 564 (1971). As a defendant in Green, the Service initially took the position that segregative private schools were entitled to tax exempt status under § 501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in Green lacks the precedential weight of a case involving a truly adversary controversy.[142]

The Court upheld the decision of the Court of Appeals, thereby forcing Bob Jones University to integrate in order to continue to be

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[140] Bob Jones University v. Simon, 416 U.S. 725, 40 L.Ed.2d 496, 509 (1974).

[141] Id. at 511.

[142] Id., n. 11.

considered as a tax exempt organization with the meaning, as interpreted by the IRS, of § 501(c)(3). The Court did not address itself to the contention by the University that its First Amendment rights were being violated on the basis that the question of constitutionality was not germane to the case. Instead, held the Court, the case centered around the language of the Anti-Injunction Act and Bob Jones University's attempt to block the IRS from withdrawing their ruling letter, thereby placing the courts in the position of acting counter to section 7421(a) of the Code, which states:

> Except as provided in section 6212(a) and (c), 6213(a), and 6426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.[143]

In responding to the problem presented by the Court's ruling in this case (i.e. that Bob Jones University must suffer the loss of their tax exempt status before continuing to challenge the constitutionality of the Anti-Injunction Act), the Court said:

> These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax exempt status and withdrawal of advance assurance of deductibility. . . .
>
> We do not say that these avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. But, as the Service notes, some delay may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation. And although the congressional restriction to postenforcement review may place an organization claiming tax exempt status in a precarious

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[143] Anti-Injunction Act of the Internal Revenue Code of 1954 (26 USCS § 7421[a]).

> financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, . . .and of the opportunities for review that are available.[144]

While deciding the foregoing case strictly, the Court did realize the burden placed upon the University and said:

> In holding that § 7421(a) blocks the present suit, we are not unaware that Congress has imposed an especially harsh regime on § 501(c)(3) organizations threatened with loss of tax exempt status and with withdrawal of advance assurance of deductibility of contributions. A former Commissioner of the International [sic] Revenue Service has sharply criticized the system applicable to such organizations. The degree of bureaucratic control that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration. But this matter is for Congress, which is the appropriate body to weigh the relevant, policy-laden considerations, such as the harshness of the present law, the consequences of an unjustified revocation of § 501(c)(3) status, the number of organizations in any year threatened with such revocation, the comparability of those organizations to others which rely on the Service's ruling-letter program, and the litigation burden on the Service and the effect on the assessment and collection of federal taxes if the law were to be changed.[145]

As noted in the above text, a former IRS Commissioner found fault with this stranglehold of the Service over those seeking relief. In a footnote to that section, the Court quoted Commissioner Thrower:

> There is no practical possibility of quick judicial appeal at the present. If we deny tax exemption or the benefit to the organization of its donors having the assurance of deductibility of contributions, the organization must either create net taxable income or other tax liability for itself as a litigable issue, or find a donor who as a guinea pig is willing to make a contribution, have it disallowed, and litigate the disallowance. Assuming the readiness of the organization or donor to litigate, the issue under the

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[144] Bob Jones University v. Simon, supra at 515.

[145] Id. at 516-17.

> best of circumstances could hardly come before a court until at least a year after the tax year in which the issue arises. Ordinarily it would take much longer for the case of the organization's status to be tried. . . . While all of this time is passing, the organization is dormant for lack of contributions and those otherwise interested in the program lose their interest and move on to other organizations blessed with the Internal Revenue Service imprimatur; and the right to judicial review is not pursued.
>
> This is an extremely unfortunate situation for several reasons. First, it offends my sense of justice for undue delay to be imposed on one who needs a prompt decision. Second, in practical effect, it gives greater finality to IRS decisions than we would want or Congress intended. Third, it inhibits the growth of a body of case law interpretative of the exempt organization provisions that could guide the IRS in its further deliberations.[146]

The impact of this case on Christian schools should be obvious. The power of the IRS to control the internal policies of a private organization through the manipulation of its tax exempt status is indeed frightening. While there may be those who decry the merits of the case on its biblical or First Amendment grounds, it must be recognized as a specter of controls to come.

Tax Credit - Boon or Doom?

After consideration of the manipulation of private institutions by the government through the Internal Revenue Service, it should be small wonder that many are cautious when evaluating the proposed tax credit bills currently being considered by both the Senate and House of Representatives.

The issue is again a question similar to those observed previously in the area of financial aid. Just how far can the federal government go in its aid of sectarian schools without running afoul of

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[146] *Id.* at 516, n. 23.

the question of separation of church and state? The answer, again, is the same: the Supreme Court must ultimately decide.

In 1973, the Supreme Court ruled a New York law, which allowed for a tax deduction for each child in the state attending a nonpublic elementary or secondary school, as being unconstitutional. The tuition grant did not end up in the hands of the religious schools since the parents were free to spend the grant money as they chose. Yet the Court held the tuition grant to have the primary effect of advancing religion.[147]

Currently in Congress there are a number of bills designed to provide aid, not to the religious nonpublic schools per se, but to the middle income families who must pay for the rising cost of education. A recent Associated Press release discussed several of the tax credit bills being considered. Said the release:

> Meanwhile, a bill by Sen. William V. Roth, R-Del., would rely on a tax credit, rather than increased federal spending, to benefit basically the same group--parents of college students, especially those who are too well off to qualify for existing government grants but too poor to pay their own way.
>
> Roth's bill, allowing a credit of up to $500 a year per student, was passed by the Senate three times in the past three years, but has never made it through the House.
>
> A bill by Sens. Bob Packwood, R-Ore., and Daniel P. Moynihan, D-N.Y., would let parents cut their federal income taxes by up to $500 a year for each child enrolled in any school that requires tuition--elementary, secondary, vocational or college.
>
> Carter's plan, to simply expand an existing program, probably faces no constitutional problem. The situation with Roth's bill is not so clear, although the Supreme Court in 1971 indicated government aid to church-related colleges provided far less risk of

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[147] Committee for Public Education v. Nyquist, supra.

"excessive government entanglement" with religion that if aid were flowing to an elementary school.

But all sides agree that enactment of the Packwood-Moynihan bill certainly would require a Supreme Court test.

The First Amendment prohibits Congress from passing any law "respecting an establishment of religion or prohibiting the free exercise thereof. . ."

The Supreme Court in 1973 ruled unconstitutional a New York law allowing an income tax deduction unrelated to the actual cost of tuition for each child attending a non-public secondary or elementary school. The justices held that the primary effect of that law was to advance religion.

Packwood and Moynihan say their bill poses no such problem. But the National Education Association, representing mainly public school teachers, opposes a tuition credit, saying it would undermine support for public education. The Moynihan-Packwood bill, NEA says, "would have the effect of advancing religion."

About 11 percent of the 50 million pupils in kindergarten through high school attend private schools. About 75 percent of those in private schools attend Catholic schools. Part of the push for the Packwood-Moynihan bill is from Catholic parents and teachers.

David Larkin, vice president of the Maryland Federation of Catholic Laity, told the House Ways and Means Committee last week that only by providing tax relief for private school pupils can Congress show that religious prejudice is dead in America.

"America's conscience has not yet awakened to the insidious disease of anti-Catholicism that still infects our national character hundreds of years after most European countries have eliminated discriminatory practices against religious groups," Larkin said.

But opponents note Thomas Jefferson's 1786 statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[148]

The Christian schools are becoming increasingly excited about the Packwood-Moynihan Education Tuition Tax Credit Bill and its proponents maintain that, if passed, it would generate one billion dollars in

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[148] Santa Cruz (Calif.) Sentinel, 19 February 1978.

new money for Christian education. They say there are no federal controls over the Christian schools in the bill and it is not a grant, nor is there money flowing from the government to the schools. It is, they claim, strictly a matter between the taxpayer and his 1040 form.

Christian legal specialists like former Congressman John Conlan and William Ball--the attorney who successfully argued the Amish case (Wisconsin v. Yoder) in the Supreme Court, the Ohio v. Whisner case before the Ohio Supreme Court, and numerous others--believe this bill is quite constitutional, does not breach the legitimate wall of separation of church and state, and is a bill that Christians can clearly and enthusiastically support as it applies equally as an educational investment tax credit for students at both public and private schools.[149]

Not only is there a constitutionality question to deal with here, but some watchdogs of governmental bureaucracy fear the potential of further inroads of federal control. Says Dr. Billings: ". . .anyone accepting this tuition tax credit is in essence receiving Federal funds, thus opening the door ever wider for Caesar to control our schools."[150]

Is a tax credit the same as receiving federal funds? If so, then there is justification in the allegation that the tax exempt status of churches and private sectarian schools is a breach of the wall of separation of church and state. However, it is ludicrous to contend that a man's wealth belongs to the government and that if the government

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[149]Conlan address, supra.

[150]Robert J. Billings, ed., "Tuition Tax Credit Act of 1977 (S. 2142, H.R. 9332)," Christian School Alert (November, 1977).

allows him to use his money to pay for an education for his child in a sectarian school of his choice, the government is aiding religion. Should such be the case, we no longer live in a capitalistic society but in one which is totally socialistic.

It may be better reasoned that the tax credit concept places the freedom of choice once again where it belongs--with the parents who choose where and how their children are educated. Frederic Bastiat, in The Law, maintained that to take from a man, under the auspices of the law, what is rightfully his and give it to another for their benefit, is legal plunder. Says Bastiat:

> See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.
>
> Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law--which may be an isolated case--is not abolished immediately, it will spread, multiply, and develop into a system.
>
> The person who profits from this law will complain bitterly, defending his acquired rights. He will claim that the state is obligated to protect and encourage his particular industry; that this procedure enriches the state because the protected industry is thus able to spend more and to pay higher wages to the poor workingmen. . . .
>
> Now, legal plunder can be committed in an infinite number of ways. Thus we have an infinite number of plans for organizing it: tariffs, protection, benefits, subsidies, encouragements, progressive taxation, public schools, guaranteed jobs, guaranteed profits, minimum wages, a right to relief, a right to the tools of labor, free credit, and so on, and so on. All these plans as a whole--with their common aim of legal plunder--constitute socialism.[151]

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[151] Frederic Bastiat, The Law, trans. Dean Russell (Irvington-on-Hudson: Foundation for Economic Education, 1950), pp. 21-22.

The logical conclusion, then, in relation to tax credit, would be that to allow a person who chooses to send his children to a sectarian school a tax credit adjustment to his taxable income is not an act of federal aid, but rather the right to educate his child as he sees fit, with his own resources, unrestricted by government intervention.

Dr. Billings sees other problems with the current tax credit bill before Congress. He writes:

> The Packwood-Moynihan Tuition Tax Credit Act of 1977 is still a piece of legislation to watch and pray about. As stated in the last issue of Alert, this bill has a lot of support, even among Christians. One of the problems we have had as believers, is the wording. In section 44C the words "accredited or approved under state law" would eliminate most of our schools from taking advantage of tuition tax credit. This editor has been in contact with Senator Packwood's office and has expressed opinions as to the wording. Mr. Skip Priest, the legislative assistant to Senator Packwood, asked that I write my opinions and send them on to his office (which I have done). The feeling is that the wording will be changed or that a paragraph would be added to include schools that abide by compulsory attendance laws with or without approval or accreditation by the state.[152]

The purpose for the inclusion of this area of legislative action pending before Congress is to point out the total picture of future conflicts facing the Christian school movement in the ensuing years. Should some type of educational tax relief pass Congress there will be, of a certainty, pending tests of constitutionality which must be decided by the Supreme Court.

The end of perseverance is not in sight. The undetermined decisions of the future demand that Christian school boards and administrators keep abreast of current legal issues which will affect the

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[152]Robert J. Billings, ed., "Still a Hot Issue," Christian School Alert (January, 1978).

success of Christian education. May God grant wisdom.

"For the Lord is our judge,
the Lord is our lawgiver,
the Lord is our king;
he will save us." (Isaiah 33:22)

CHAPTER 5

SUMMARY

In this study, the wide expanse of legal issues which could be evaluated under the topic of school law has of necessity been limited to an intensive critique of four major areas. These areas are: (1) the degree of jurisdiction which the government, both federal and state, exercises over Christian schools, (2) due process as prescribed by the Fourteenth Amendment, (3) federal aid to Christian schools, and (4) the Internal Revenue Service and Christian education.

An evaluation of jurisdiction brought to light the most conclusive answers to the posed questions in the four areas of study. Both the federal and state governments exercise jurisdiction over Christian schools. The Tenth Amendment grants to the various states jurisdiction over education within their boundaries. Therefore, due to the state's interest of perpetuating its form of government through an educated citizenry, the state has established compulsory education laws and standards of achievement which it feels are necessary to fulfill its task.

The federal government exercises jurisdiction over education through controls covering use of federal tax dollars made available to education on the basis of the general welfare clause in the Constitution (Article 1, § 8). The federal government further exercises jurisdiction over education in the courts. The courts, through their exercise of the power of judicial review, pass judgments which have the effect of law,

otherwise known as de jure legislation. The Supreme Court has had the greatest impact of any of the governmental branches upon education in the United States. Through its role of protecting the rights of the individual--life, liberty, and property--from the encroachment of government, the Court has become the single most authoritarian source of information on school law--thus its fundamental importance in this paper.

Neither the state nor federal governments, however, have unlimited authority. The courts have protected the rights of parents to educate their children in private schools as an extention of their First Amendment right of free exercise of religion. As such, it may not be infringed upon by the state. The only exception would be if there is a compelling state interest of sufficient magnitude to override the right of the parent, and that state interest cannot be served in any other manner.

Since the Fourteenth Amendment is intended to protect the rights of the individual from the potential encroachment of government upon his civil liberties, it is safe to conclude that this amendment is an immunity against state, not private, action. This being the case, the Christian schools, as private institutions, are not currently bound by the due process or equal protection clauses of the Fourteenth Amendment. The relationship between the Christian school and its constituents is strictly a matter of private contract. However, the door to greater state and federal control through the Fourteenth Amendment has been left open by the public function doctrine. That the Christian schools do indeed perform a public function by meeting state standards of compulsory education bring them closer to the point where they too, like the

public schools, must conform to and become subject to the statutory and constitutional rights of their students and staff. At this time, however, the Christian schools are not having to experience the extremes of litigation involving civil liberties which face the public schools.

The problems of financing the education of today's youth extend beyond the realm of public education. The inflationary spiral reaches into the private educational sector as well and creates an issue of the use of public funds to support private education. This issue centers around the First Amendment prohibition regarding church-state relationships. The private sector of education argues that since the schools do perform a public function, they are entitled to public funds for the secular aspect of their educational endeavors. They further argue that the public monies would go to benefit the child and not to advance religion.

Within the Christian school movement there are those who favor and those who are against the acceptance and use of public funds. Fifty years of litigation have failed to find any firm answer to the question of what constitutes a violation of the First Amendment and what is acceptable aid for the benefit of the child. The instability of this issue in the courts should be an indicator to educators in Christian education that it is risky to count on continual income or services from public sources. Further, they should be reminded of the great potential for government control that is intertwined with use of public funds.

The last of the four areas is closely linked with the issue of public financing of nonpublic education. There are those who would deny

tax exemption to sectarian education because in their estimation it constitutes indirect public aid. As yet this has not come before the courts for review. However, the IRS has been used as an instrument to force the will of government regarding desegregation upon private schools. Not only have schools lost their ruling letter for failure to comply with desegregation directives, but current IRS regulations require all private schools to annually report on their nondiscriminatory admissions policies.

Also, the question of the constitutionality of the pending tax credit legislation is not yet answered. Should any of the current bills pass Congress, they must pass the scrutiny of the courts. What potential controls may eventually be disclosed is also open to the analysis of time. Yet with these unknown factors many Christians are supporting tax credit legislation as the only foreseeable relief to their double taxation for education.

In essence, each area covered in this paper may be summed up in one terse statement--the courts must decide. That in itself is a frightening observation. Over and over again the courts have established one fact: there are no absolutes. Because there are no absolutes in law, there can be no security in precedence. Even the Constitution, which was established by the founders to be the supreme law of the land, becomes weak and relative when viewed from the perspective of judicial interpretation. Francis Schaeffer utilized prophetic logic in his evaluation of the direction of the United States in the area of legal absolutes:

> In the United States many other practical problems developed as man's desire to be autonomous from God's revelation--in the Bible and through Christ--increasingly reached its natural conclusions. Sociologically, law is king. . .was no longer the base whereby one could be ruled by law rather than the arbitrary judgments of men and whereby there could be wide freedoms without chaos. Any ways in which the system is still working is largely due to the sheer inertia of the continuation of the past principles. But this borrowing cannot go on forever.
>
> As we have seen, there is a danger that without a sufficient base modern science will become sociological science; so civil law has moved toward being sociological law. Distinguished jurist and Supreme Court Justice Oliver Wendell Holmes, Jr. (1841-1935) took a long step in this direction. In The Common Law (1881) Holmes said that law is based on experience. Daniel H. Benson (1936 -), assistant professor of law at the Texas Tech University School of Law, quotes Holmes: "Truth is the majority vote of that nation that could lick all others." In a 1926 letter to John C. H. Wu, Holmes wrote: "So when it comes to the development of a corpus juris the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." This is very different from Samuel Rutherford's biblical base and from Paul Robert's painting in which Justice points to "The Word of God."
>
> Frederick Moore Vinson (1890-1953), former Chief Justice of the United States Supreme Court, spelled out this problem by saying, "Nothing is more certain in modern society than the principle that there are no absolutes." All is relative; all is experience. In passing, we should note this curious mark of our age: The only absolute allowed is the absolute insistence that there is no absolute.[153]

Man's folly of placing himself above God's standards of truth will result in his downfall, and his judgment will be based upon God's proclaimed truth as found in Romans 2:1-11:

> Therefore thou art inexcusable, O man, whosoever thou art that judgest: for wherein thou judgest another, though condemnest thyself; for thou that judgest doest the same things. But we are sure that the judgment of God is according to truth against them which commit such things. And thinkest thou this, O man, that judgest them which do such things, and doest the same, that thou shalt escape the judgment of God? Or despisest thou the riches of his

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[153]Schaeffer, How Should We Then Live, pp. 216, 217.

goodness and forbearance and long-suffering; not knowing that the goodness of God leadeth thee to repentance? But after they hardness and impenitent heart treasurest up unto thyself wrath against the day of wrath and revelation of the righteous judgment of God; who will render to every man according to his deeds; To them who by patient continuance in well doing seek for glory and honour and immortality, eternal life: But unto them that are contentious, and do not obey the truth, but obey unrighteousness, indignation and wrath, Tribulation and anguish, upon every soul of man that doeth evil, of the Jew first, and also of the Gentile; But glory, honour, and peace, to every man that worketh good, to the Jew first, and also to the Gentile: For there is no respect of persons with God.

APPENDIX A

Analysis of Supreme Court Decision
in Wolman v. Walter

A. Three-Part Test used as Mode of Analysis:

1. Statute must have a secular legislative purpose.

2. Must have a principal or primary effect that neither advances nor inhibits religion.

3. Statute must not foster an excessive government entanglement with religion.

B. Vote by Justices:

1. Textbooks	Yes - Burger, Rehnquist, White, Powell, Stewart, Blackmun
	No - Marshall, Brennan, Stevens
2. Standardized Testing	Yes - Burger, Rehnquist, White, Powell, Stewart, Blackmun
	No - Marshall, Brennan, Stevens
3. Diagnostic Services	
a. Nursing, physicians, dental, optometric	Yes - Burger, Rehnquist, White, Powell, Stewart, Blackmun, Marshall, Stevens
b. Speech and hearing	No - Brennan
c. Psychological	
4. Therapeutic and Remedial Services	
a. Speech and hearing	Yes - Burger, Rehnquist, White, Powell, Stewart, Blackmun, Stevens
b. Psychological	
c. Guidance	
d. Remedial	No - Marshall, Brennan
e. Services for deaf, blind, emotionally disturbed	

5. Materials and Equipment	Yes -	Burger, Rehnquist, White
	No -	Stewart, Blackmun, Powell, Marshall, Stevens, Brennan
6. Field Trip Transportation	Yes -	Burger, Rehnquist, White, Powell
	No -	Stewart, Blackmun, Marshall, Stevens, Brennan

APPENDIX B

Form **1023**
(Rev. November 1972)
Department of the Treasury
Internal Revenue Service

Application for Recognition of Exemption

Under Section 501(c)(3) of the Internal Revenue Code

To be filed in the District in which the organization has its principal office or place of business.

This application, when properly completed, shall constitute the notice required under section 508(a) of the Internal Revenue Code in order that organizations may be treated as described in section 501(c)(3) of the code, and the notice under section 508(b) appropriate to those organizations claiming not to be private foundations within the meaning of section 509(a).

Part I.—Identification (See instructions)

1 Full name of organization

2 Employer identification number (If none, attach Form SS—4)

3(a) Address (number and street)

3(b) City or town, State and ZIP code

4 Name and phone number of person to be contacted

5 Month the annual accounting period ends

6 Date incorporated or formed

7 Activity Codes (see instructions)

Part II.—Organizational Documents (See instructions)

1 Attach a conformed copy of the organization's creating instruments (articles of incorporation, constitution, articles of association, deed of trust, etc.).

2 Attach a conformed copy of the organization's by-laws or other rules for its operation.

3 If the organization does not have a creating instrument, check here (See instructions) . . . . . ☐

Part III.—Activities and Operational Information (See instructions)

1 What are or will be the organization's sources of financial support? List in order of magnitude. If a portion of the receipts is or will be derived from the earnings of patents, copyrights, or other assets (excluding stock, bonds, etc.), identify such item as a separate source of receipt. Attach representative copies of solicitations for financial support.

2 Describe the organization's fund-raising program and explain to what extent it has been put into effect. (Include details of fund-raising activities such as selective mailings, formation of fund-raising committees, use of professional fund raisers, etc.)

I declare under the penalties of perjury that I am authorized to sign this application on behalf of the above organization and I have examined this application, including the accompanying statements, and to the best of my knowledge it is true, correct and complete.

(Signature) (Title or authority of signer) (Date)

Part III.—Activities and Operational Information (Continued)

3 Give a narrative description of the activities presently carried on by the organization, and also those that will be carried on. If the organization is not fully operational, explain what stage of development its activities have reached, what further steps remain for the organization to become fully operational, and when such further steps will take place. The narrative should specifically identify the services performed or to be performed by the organization. (Do not state the purposes of the organization in general terms or repeat the language of the organizational documents.) If the organization is a school, hospital, or medical research organization, include sufficient information in your description to clearly show that the organization meets the definition of that particular activity that is contained in the instructions for Part VII–A on page 3 of the instructions.

Part III.—Activities and Operational Information (Continued)

4 The membership of the organization's governing body is:

(a) Names, addresses, and duties of officers, directors, trustees, etc.	(b) Specialized knowledge, training, expertise, or particular qualifications

(c) Do any of the above persons serve as members of the governing body by reason of being public officials or being appointed by public officials? . . . . . ☐ Yes ☐ No

If "Yes," please name such persons and explain the basis of their selection or appointment.

(d) Are any members of the organization's governing body "disqualified persons" with respect to the organization (other than by reason of being a member of the governing body) or do any of the members have either a business or family relationship with "disqualified persons"? (See specific instructions 4(d).) . . ☐ Yes ☐ No

If "Yes," please explain.

5 Does the organization control or is it controlled by any other organization? . . . . . ☐ Yes ☐ No

Is the organization the outgrowth of another organization, or does it have a special relationship to another organization by reason of interlocking directorates or other factors? . . . . . ☐ Yes ☐ No

If either of these questions is answered "Yes," please explain.

6 Is the organization financially accountable to any other organization? . . . . . ☐ Yes ☐ No

If "Yes," please explain and identify the other organization. Include details concerning accountability or attach copies of reports if any have been rendered.

7 What assets does the organization have that are used in the performance of its exempt function? (Do not include income producing property.) If any assets are not fully operational, explain what stage of completion has been reached, what additional steps remain to be completed, and when such final steps will be taken.

Part III.—Activities and Operational Information (Continued)

8 (a) What benefits, services, or products will the organization provide with respect to its exempt function?

(b) Have the recipients been required or will they be required to pay for the organization's benefits, services, or products? . . . . . ☐ Yes ☐ No

If "Yes," please explain and show how the charges are determined.

9 Does or will the organization limit its benefits, services or products to specific classes of individuals? . . . ☐ Yes ☐ No

If "Yes," please explain how the recipients or beneficiaries are or will be selected.

10 Is the organization a membership organization? . . . . . ☐ Yes ☐ No

If "Yes," complete the following:

(a) Please describe the organization's membership requirements and attach a schedule of membership fees and dues.

(b) Are benefits limited to members? . . . . . ☐ Yes ☐ No

If "No," please explain.

(c) Attach a copy of the descriptive literature or promotional material used to attract members to the organization.

11 Does or will the organization engage in activities tending to influence legislation or intervene in any way in political campaigns? . . . . . ☐ Yes ☐ No

If "Yes," please explain.

Part IV.—Statement as to Private Foundation Status (See instructions)

1 Is the organization a private foundation? . . . . . ☐ Yes ☐ No

2 If question 1 is answered "No," indicate the type of ruling being requested as to the organization's status under section 509 by checking the applicable box below:

☐ Definitive ruling under section 509(a)(1), (2), (3), or (4) — complete Part VII.

☐ Advance or extended advance ruling under section 509(a)(1) or (2) — See instructions.

3 If question 1 is an answered "Yes," and the organization claims to be a private operating foundation, check here ☐ and complete Part VIII.

Part V.—Financial Data (See instructions)

Statement of Receipts and Expenditures, for period ending ....., 19.....

	Receipts	
1	Gross contributions, gifts, grants and similar amounts received	
2	Gross dues and assessments of members	
3	Gross amounts derived from activities related to organization's exempt purpose	
	Less cost of sales	
4	Gross amounts from unrelated business activities	
	Less cost of sales	
5	Gross amount received from sale of assets, excluding inventory items (attach schedule)	
	Less cost or other basis and sales expense of assets sold	
6	Interest, dividends, rents and royalties	
7	Total receipts	
	Expenditures	
8	Contributions, gifts, grants, and similar amounts paid (attach schedule)	
9	Disbursements to or for benefit of members (attach schedule)	
10	Compensation of officers, directors, and trustees (attach schedule)	
11	Other salaries and wages	
12	Interest	
13	Rent	
14	Depreciation and depletion	
15	Other (attach schedule)	
16	Total expenditures	
17	Excess of receipts over expenditures (line 7 less line 16)	

	Balance Sheets (Enter dates ▶)	Beginning date	Ending date
	Assets		
18	Cash (a) Interest bearing accounts		
	(b) Other		
19	Accounts receivable, net		
20	Inventories		
21	Bonds and notes (attach schedule)		
22	Corporate stocks (attach schedule)		
23	Mortgage loans (attach schedule)		
24	Other investments (attach schedule)		
25	Depreciable and depletable assets (attach schedule)		
26	Land		
27	Other assets (attach schedule)		
28	Total assets		
	Liabilities		
29	Accounts payable		
30	Contributions, gifts, grants, etc., payable		
31	Mortgages and notes payable (attach schedule)		
32	Other liabilities (attach schedule)		
33	Total liabilities		
	Fund Balance or Net Worth		
34	Total fund balance or net worth		
35	Total liabilities and fund balance or net worth (line 33 plus line 34)		

Part VI.—Required Schedules for Special Activities (See instructions)

		If "Yes," check here:	And, complete schedule—
1	Is the organization, or any part of it, a school?		A
2	Does the organization provide or administer any scholarship benefits, student aid, etc.?		B
3	Has the organization taken over, or will it take over, the facilities of a "for profit" institution?		C
4	Is the organization, or any part of it, a hospital?		D
5	Is the organization, or any part of it, a home for the aged?		E
6	Is the organization, or any part of it, a litigating organization (public interest law firm or similar organization)?		F

Part VII.—Non-Private Foundation Status (Definitive ruling only)

A.—Basis for Non-Private Foundation Status

The organization is not a private foundation because it qualifies as:

	√	Kind of organization	Within the meaning of	Complete
1		a church	Sections 509(a)(1) and 170(b)(1)(A)(i)	
2		a school	Sections 509(a)(1) and 170(b)(1)(A)(ii)	
3		a hospital	Sections 509(a)(1) and 170(b)(1)(A)(iii)	
4		a medical research organization operated in conjunction with a hospital	Sections 509(a)(1) and 170(b)(1)(A)(iii)	
5		being organized and operated exclusively for testing for public safety	Section 509(a)(4)	
6		being operated for the benefit of a college or university which is owned or operated by a governmental unit	Sections 509(a)(1) and 170(b)(1)(A)(iv)	Part VII.–B
7		normally receiving a substantial part of its support from a governmental unit or from the general public	Sections 509(a)(1) and 170(b)(1)(A)(vi)	Part VII.–B
8		normally receiving not more than one-third of its support from gross investment income and more than one-third of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions (subject to certain exceptions)	Section 509(a)(2)	Part VII.–B
9		being operated solely for the benefit of or in connection with one or more of the organizations described in 1 through 4, or 6, 7 and 8, above	Section 509(a)(3)	Part VII.–C

B.—Analysis of Financial Support

		(a) Most recent taxable year 19.....	(Years next preceding most recent taxable year) (b) 19.....	(c) 19.....	(d) 19.....	(e) Total
1	Gifts, grants, and contributions received					
2	Membership fees received					
3	Gross receipts from admissions, sales of merchandise or services, or furnishing of facilities in any activity which is not an unrelated business within the meaning of section 513					
4	Gross income from interest, dividends, rents and royalties					
5	Net income from organization's unrelated business activities					
6	Tax revenues levied for and either paid to or expended on behalf of the organization					
7	Value of services or facilities furnished by a governmental unit to the organization without charge (not including the value of services or facilities generally furnished the public without charge)					
8	Other income (not including gain or loss from sale of capital assets)—attach schedule					
9	Total of lines 1 through 8					
10	Line 9 less line 3					
11	Enter 2% of line 10, column (e) only					

12 If the organization has received any unusual grants during any of the above taxable years, attach a list for each year showing the name of the contributor, the date and amount of grant, and a brief description of the nature of such grant. Do not include such grants in line 1 above. (See instructions)

B.—Analysis of Financial Support (Continued)

13 If the organization's non-private foundation status is based upon:

(a) Sections 509(a)(1) and 170(b)(1)(A)(iv) or (vi).—Attach a list showing the name and amount contributed by each person (other than a governmental unit or "publicly supported" organization) whose total gifts for the entire period exceed the amount shown on line 11.

(b) Section 509(a)(2).—With respect to the amounts included on lines 1, 2, and 3, attach a list for each of the above years showing the name of and amount received from each person who is a "disqualified person."

With respect to the amount included in line 3, attach a list for each of the above years showing the name of and amount received from each payor (other than a "disqualified person") whose payments to the organization exceeded $5,000. For this purpose, "payor" includes but is not limited to any organization described in sections 170(b)(1)(A)(i) through (vi) and any government agency or bureau.

C.—Supplemental Information Concerning Organizations Claiming Non-Private Foundation Status Under Section 509(a)(3)

1 Organizations supported by applicant organization:

Name and address of supported organization	Has the supported organization received a ruling or determination letter that it is not a private foundation by reason of sections 509(a)(1), or (2)?

2 What does the applicant organization do to support the above organizations?

3 In what way do the supported organizations operate, supervise, or control the applicant organization, or in what way are the supported and applicant organizations operated in connection with each other?

4 Is the applicant organization controlled directly or indirectly by one or more "disqualified persons" (other than one who is a disqualified person solely because he is a manager) or by an organization which is not described in section 509(a)(1) or (2)? . . . . . ☐ Yes ☐ No

If "Yes," please explain.

Part VIII.—Basis for Status as a Private Operating Foundation

If the organization—

(a) bases its claim to private operating foundation status upon normal and regular operations over a period of years; or

(b) is newly created, set up as a private operating foundation, and has at least one year's experience;

complete the schedule below answering the questions under the income test and one of the three supplemental tests (assets, endowment, or support). If the organization does not have at least one year's experience, complete line 21. If the organization's private operating foundation status depends upon its normal and regular operations as described in (a) above, submit, as an additional attachment, data in tabular form corresponding to the schedule below for the three years next preceding the most recent taxable year.

	Income Test	Most recent taxable year
1	Adjusted net income, as defined in section 4942(f)	
2	Qualifying distributions:	
	(a) Amounts (including administrative expenses) paid directly for the active conduct of the activities for which organized and operated under section 501(c)(3) (attach schedule)	
	(b) Amounts paid to acquire assets to be used (or held for use) directly in carrying out purposes described in sections 170(c)(1) or 170(c)(2)(B) (attach schedule)	
	(c) Amounts set aside for specific projects which are for purposes described in section 170(c)(1) or 170(c)(2)(B) (attach schedule)	
	(d) Total qualifying distributions (add lines 2(a), (b), and (c))	
3	Percentage of qualifying distributions to adjusted net income (divide line 1 into line 2(d)—percentage must be at least 85 percent	%
	Assets Test	
4	Value of organization's assets used in activities that directly carry out the exempt purposes. Do not include assets held merely for investment or production of income (attach schedule)	
5	Value of any corporate stock of corporation that is controlled by applicant organization and carries out its exempt purposes (attach statement describing such corporation)	
6	Value of all qualifying assets (add lines 4 and 5)	
7	Value of applicant organization's total assets	
8	Percentage of qualifying assets to total assets (divide line 7 into line 6—percentage must exceed 65 percent)	%
	Endowment Test	
9	Value of assets not used (or held for use) directly in carrying out exempt purposes:	
	(a) Monthly average of investment securities at fair market value	
	(b) Monthly average of cash balances	
	(c) Fair market value of all other investment property (attach schedule)	
	(d) Total (add lines 9(a), (b), and (c))	
10	Subtract acquisition indebtedness with respect to line 9 items (attach schedule)	
11	Balance (line 9 less line 10)	
12	Apply to line 11 a factor equal to two-thirds the current applicable percentage for the minimum investment return under section 4942(e)(3). Line 2(d) must equal or exceed the result of this computation	
	Support Test	
13	Applicant organization's support as defined in section 509(d)	
14	Less—amount of gross investment income as defined in section 509(e)	
15	Support for purposes of section 4942(j)(3)(B)(iii)	
16	Support received from the general public, five or more exempt organizations, or a combination thereof (attach schedule)	
17	For persons (other than exempt organizations) contributing more than 1 percent of line 15, enter the total amounts in excess of 1 percent of line 15	
18	Subtract line 17 from line 15	
19	Percentage of total support (divide line 15 into line 18—must be at least 85 percent)	%
20	Does line 16 include support from an exempt organization which is in excess of 25 percent of the amount on line 15?	☐ Yes ☐ No

21 Newly created organizations with less than one year's experience: Attach a statement explaining how the organization is planning to satisfy the requirements of section 4942(j)(3) with respect to the income test and one of the supplemental tests during its first year's operation. Include a description of plans and arrangements, press clippings, public announcements, solicitations for funds, etc.

SCHEDULE A.—Schools, Colleges, and Universities

(Answer questions 2 and 3 only if questions 1(a) and 1(b) are answered "No.")

1 Does or will the organization (or any department or division within it) discriminate in any way on the basis of race with respect to:

(a) Admissions? . . . . . ☐ Yes ☐ No

(b) Use of facilities or exercise of student privileges? . . . . . ☐ Yes ☐ No

If "Yes" for either of the above, please explain.

2 If the organization's governing instruments do not clearly set forth a racially nondiscriminatory policy as to its students, check here ☐. Attach whatever corporate resolutions or other official statements the organization has made on this subject.

3 Has the organization publicized its racially nondiscriminatory policies in a manner that brings such policies to the attention of all members of the community which it serves? . . . . . ☐ Yes ☐ No

If "Yes," please describe how these policies have been publicized. Also attach a copy of the organization's most current admissions bulletin or catalog and clippings of any relevant advertising.

SCHEDULE B.—Organizations Providing Scholarship Benefits, Student Aid, etc. to Individuals

1 Please describe the nature of the scholarship benefit, student aid, etc. including the terms and conditions governing its use, whether a gift or a loan, and the amount thereof. If the organization has established or will establish several categories of scholarship benefits, identify each kind of such benefit and explain how the organization determines the recipients for each category. Attach a sample copy of any application the organization requires or will require of individuals to be considered for scholarship grants, loans, or similar benefits.

2 How does or will the organization select its recipients and what criteria does or will it use in making such selections?

3 Does or will the organization have any restrictions or limitations in its selection procedures based upon racial standards? . . . . . ☐ Yes ☐ No

If "Yes," please explain.

Form **990**
Department of the Treasury
Internal Revenue Service

Return of Organization Exempt from Income Tax

Under section 501(c) of the Internal Revenue Code (Except Private Foundation)

1975

For the calendar year 1975, or fiscal year beginning , 1975, and ending , 19

Please type, print or attach label. See instruction O.

Name of organization

Address (number and street)

City or town, State, and ZIP code

A If gross receipts are not normally more than $5,000 (see general instructions A(4) and R) check here ▶

B Employer identification number (See instruction G)

C Date created (See instruction P) ▶

D Date of exemption letter ▶

E Fair market value of assets at end of year (See instruction Q) ▶

F Enter exemption Code paragraph ▶ 501(c)( ). Check appropriate box if applicable—Exempt under section ▶ ☐ 501(e) or ☐ 501(f)

G If exemption application is pending, check here ▶

H If address changed, check here ▶

Note: If you checked block "A" above, do not complete Part I or Part II. For rounding off money items to whole dollar amounts—see instructions.

Part I All Organizations Complete Part I. If line 8 is $10,000 or less, complete only Part I. Do not complete Part II.

Receipts (Revenue)	1 Gross sales and receipts from all sources, other than shown on lines 5 and 6		
	2 Cost of goods sold		
	3 Cost or other basis and sales expenses of assets sold		
	4 Gross income (line 1 less sum of lines 2 and 3)		
	5 Gross dues and assessments from members and affiliates		
	6 Gross contributions, gifts, grants and similar amounts received (see instructions)		
	7 Total (add lines 4, 5 and 6)		
	8 Gross receipts for filing requirements tests (add lines 1, 5 and 6)		
Expenses and Disbursements	9 Expenses attributable to gross income		
	10 Expenses attributable to amount on line 6		
	11 Disbursements for purposes for which exempt		
	12 Excess of receipts over expenses and disbursements (line 7 less sum of lines 9, 10, and 11) Increase or (Decrease) in net worth (see instructions)		
		Beginning of year	End of year
Assets and Liabilities	13 Total assets		
	14 Total liabilities		
	15 Net worth		

		Yes	No
16	Have you engaged in any activities which have not previously been reported to the Internal Revenue Service? If "Yes," attach a detailed description of such activities		
17	Have any changes not previously reported to the Internal Revenue Service been made in your governing instrument, articles of incorporation, or bylaws, or other instruments of similar import? If "Yes," attach a copy of the changes		
18	(a) Is this a group return filed on behalf of affiliated organizations covered by a group exemption letter? (See instruction G.)		
	(b) Is this a return filed by an affiliated organization covered by a group exemption letter? If "Yes," enter your central or parent organization's four-digit group exemption number (GEN). (See instruction G.) ▶		
19	Have you filed a tax return on Form 990–T, "Exempt Organization Business Income Tax Return," for this year?		
20	Was there a substantial contraction during the year? (See instruction N.) If "Yes" attach a schedule for the disposition(s) for the year(s) showing type of asset disposed of, the date(s) disposed, the cost or other basis, the fair market value on date of disposition and the names and addresses of the recipients of the assets distributed		
21	(a) Enter amount expended directly or indirectly for political purposes $		
	(b) Did you file Form 1120–POL, "U.S. Income Tax Return of Certain Political Organizations," for this year?		

22	Clubs exempt under section 501(c)(7) enter amount of:	
	(a) Initiation fees and capital contributions included in line 5, Part I	
	(b) Gross receipts from general public from use of club facilities included in line 1, Part I. (See instruction 22)	
23	Organizations exempt under section 501(c)(12) enter amount of:	
	(a) The total amount of gross income received from members or shareholders	
	(b) The total amount of gross income received from other sources. (Do not net amounts due or paid to other sources against amounts due or received from them.)	
24	Enter your principal activity codes from last page of instructions	

25 The books are in care of ▶ ..... Telephone No. ▶ .....
Located at ▶

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Date	Signature of officer or trustee	Title
Date	Signature of individual or firm preparing return	Preparer's address

e18—18—82707–1

Form 990 (1975) **Part II** Organizations with Gross Receipts of More Than $10,000—Complete Part II

Receipts from Other Sources (line 1, Part I)

1 Gross sales or receipts from all business activities (state nature). (Attach a statement explaining how each business activity not reported on Form 990-T contributed importantly to your exempt purpose. See instruction J.)	
2 Interest	
3 Dividends	
4 Gross rents	
5 Gross royalties	
6 Gross amount received from sale of assets, excluding inventory items (attach schedule)	
7 Other income (attach schedule—do not include contributions, gifts, grants, etc.)	
8 Total gross sales and receipts from other sources. Enter here and on line 1, page 1	

Expenses and Disbursements (lines 9, 10, and 11, Part I)	(A) Attributable to gross income	(B) Attributable to cont's, gifts, etc., rec'd	(C) For exempt purposes
9 Contributions, gifts, grants, and similar amounts paid (attach schedule—see instructions)			
10 Disbursements to or for members (attach schedule—see instructions)			
11 Compensation of officers, directors, and trustees (attach schedule—see instructions)			
12 Other salaries and wages			
13 (a) Pension plans (see instructions). (Enter number of plans ➤)			
(b) Employee benefit programs (see instructions)			
14 Interest			
15 Taxes			
16 Rent			
17 Depreciation (and depletion) (attach schedule—see instructions)			
18 Direct fees paid for raising contributions, gifts, grants, etc.			
19 Other (attach schedule)			
20 Totals. Enter here and on lines 9, 10 and 11, page 1			

Balance Sheets		Beginning of Taxable Year		End of Taxable Year	
		(A) Amount	(B) Total	(C) Amount	(D) Total
Assets	21 Cash: (a) Savings and interest-bearing accounts				
	(b) Other				
	22 Accounts receivable net				
	23 Notes receivable net (attach schedule)				
	24 Inventories				
	25 Gov't obligations: (a) U.S. and instrumentalities				
	(b) State, subdivisions thereof, etc.				
	26 Investments in nongovernmental bonds, etc. (attach schedule)				
	27 Investments in corporate stocks (attach schedule)				
	28 Mortgage loans (number of loans ____)				
	29 Other investments (attach schedule)				
	30 Depreciable (depletable) assets (attach schedule)				
	(a) Less accumulated depreciation (depletion)				
	31 Land				
	32 Other assets (attach schedule)				
	33 Total assets (enter here and on line 13, Part I)				
Liabilities	34 Accounts payable				
	35 Contributions, gifts, grants, etc., payable				
	36 (a) Bonds and notes payable (attach schedule)				
	(b) Mortgages payable				
	37 Other liabilities (attach schedule)				
	38 Total liabilities (enter here and on line 14, Part I)				
Net Worth	39 Capital stock or principal fund balance				
	40 Paid-in or capital surplus				
	41 Retained earnings or income fund balance				
	42 Total net worth (enter here and on line 15, Part I)				
	43 Total Liabilities and Net Worth				

Foreign organizations—Enter book value $..... and fair market value $..... of assets held within the United States for investment.

U.S. GOVERNMENT PRINTING OFFICE 948—16—82707-1

Form **5578**
(October 1976)
Department of the Treasury
Internal Revenue Service

Annual Certification of Racial Nondiscrimination for a Private School Exempt from Federal Income Tax

(For Use by Organizations That Do Not File Form 990)

This Form is Open to Public Inspection

For IRS use ONLY ▶

For the period beginning , 19 , and ending , 19

1(a) Name of organization which operates, supervises and/or controls school(s) | (b) Employer identification number (see instruction F)

Address (number and street)

City or town, State and ZIP code

2(a) Name of central organization holding group exemption letter covering the school(s). (If the same as the organization in 1(a) above, write "Same" and complete 2(c).) If the organization in 1(a) above holds an individual exemption letter, write "Not Applicable." | (b) Employer identification number

Address (number and street) | (c) Group exemption number (see instruction G)

City or town, State and ZIP code

3(a) Name of school (if more than one school, write "See Attached," and attach list of the names, addresses, ZIP codes and employer identification numbers of the schools). If same as the organization in 1(a) above, write "Same." | (b) Employer identification number, if any

Address (number and street)

City or town, State and ZIP code

Under penalties of perjury, I hereby certify that I am authorized to take official action on behalf of the above school(s) and that to the best of my knowledge and belief the school(s) has (have) satisfied the applicable requirements of sections 4.01 through 4.05 of Revenue Procedure 75–50 for the period covered by this certification.

(Signature) (Title or authority of signer) (Date)

Instructions

A. Who Must File.—Every organization exempt or claiming to be exempt from Federal income tax under section 501(c)(3) of the Code and operating, supervising, and/or controlling a private school (or schools) must file a certification of racial nondiscrimination. If an organization is required to file Form 990, Return of Organization Exempt from Income Tax, either as a separate return or as part of a group return, the certification will be made on Form 990 and not on this form. The school(s) covered by a certification on this form must be listed as indicated in item 3.

An authorized official of a central organization may file one form to certify for the school activities of subordinates, that would otherwise be required to file on an individual basis, on condition that the central organization has sufficient control over the schools listed on the form to ensure their continuing adherence to a racially nondiscriminatory policy as to students.

B. When to File.—Although Rev. Proc. 75–50, 1975–2 C.B. 587, requires a certification of racial nondiscrimination to be filed annually, the first certification will cover the period beginning November 6, 1975, and ending with the organization's first calendar year or fiscal period beginning after December 31, 1975. File the form by the 15th day of the fifth month following the close of the period.

C. Where to File.—File the form with the Internal Revenue Service Center, P.O. Box 187, Cornwell Heights, Philadelphia, Pennsylvania 19020.

D. Certification Requirement.—Section 4.06 of Rev. Proc. 75–50 requires an individual authorized to take official action on behalf of a school that claims to be racially nondiscriminatory as to students to certify annually, under penalties of perjury, that to the best of his/her knowledge and belief the school has satisfied the applicable requirements of sections 4.01 through 4.05 of the Procedure.

Section 4.01 requires a school to include a statement in its charter, bylaws, or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students.

Section 4.02 requires a school to include a statement of its racially nondiscriminatory policy as to students in all its brochures and catalogues dealing with student admissions, programs, and scholarships. Further, every school must include a reference to its racially nondiscriminatory policy in other written advertising that it uses as a means of informing prospective students of its programs.

Section 4.03 requires a school to make its racially nondiscriminatory policy known to all segments of the general community served by the school. Further, a school must be prepared to demonstrate that it has publicly disavowed or repudiated any statements purported to have been made on its behalf after November 6, 1975, that are contrary to its publicity of a racially nondiscriminatory policy as to students, to the extent that the school or its principal officials were aware of such statements.

Section 4.04 requires a school to be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

Section 4.05 requires that, as a general rule, all scholarships or other comparable benefits procurable for use at any given school must be offered on a racially nondiscriminatory basis. However, a financial assistance program favoring members of one or more racial/ethnic groups will not adversely affect exempt status if its operation does not significantly derogate from the maintenance of a racially nondiscriminatory policy as to students.

E. Definition of Terms.—The term "racially nondiscriminatory policy as to students" means the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and other school-administered programs.

The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin.

The term "school" means an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. The term includes primary, secondary, preparatory, or high schools, and colleges and universities, whether operated as a separate legal entity or as an activity of a church or other organization described in section 501(c)(3) of the Code. The term also includes preschools and any other organization that is a school as defined in section 170(b)(1)(A)(ii) of the Code.

A central organization is an organization which has one or more subordinates under its general supervision or control. A subordinate is a chapter, local, post, or other unit of a central organization. A central organization may also be a subordinate, an example would be a state organization which has subordinate units and is itself affiliated with a national organization.

F. Employer Identification Number.—The employer identification number (EIN) is a nine-digit number issued by the Service to identify organizations subject to various provisions of the tax law.

G. Group Exemption Number.—The group exemption number (GEN) is a four-digit number issued to a central organization (see instruction E above) by the Service to identify a central organization that has received a ruling from the Service recognizing on a group basis the exemption from Federal income tax of the central organization and its covered subordinates.

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GLOSSARY OF LEGAL TERMS

Abrogate: to annul, repeal, or destroy

Accusation: formal charge made to one having jurisdiction that the accused is guilty of a punishable offense

Acquittal: release of a charge against the accused

Amicus curiae: a friend of the court

Appellant: one who appeals from a judicial decision or decree

Appellee: one against whom an appeal is taken

Arbitration: the submission of a disputed matter to selected parties

Assault: an attempt or offer to beat another without touching him

Battery: an unlawful beating or other wrongful physical violence or constraint without the victim's consent

Brief: a condensed summary of a legal document, as of a court case

Certiorari: a writ issued by a superior court directing an inferior court to send up some proceeding then in its possession or jurisdiction

Corpus juris: a body of law; an encyclopedic statement of the principles of Anglo-American law

De facto: in fact; in deed; actually, as of an officer who is in possession of an office without lawful title

De jure: by right; such as one having rightful title to an office or power, but has never had actual possession of it

Dictum: a shortened form of obiter dictum, which is an opinion of the judge "uttered by the way" not upon the main question before the court, but on a collateral subject; hence, not binding on other judges

Ex post facto law: a law passed after the fact. An act committed prior to the passage of a law, which makes the act criminal, may not be prosecuted as criminal.

In loco parentis: standing in place of the parent

Injunction: writ prohibiting some action issued by a court or judge

Mandamus: a court order or writ directing a corporation or officer thereof commanding performance of an act belonging to that particular corporation or officer. Mandamus will not lie to compel officers to decide one way or another where they have discretionary powers, but will lie to compel such officials to act.

Plaintiff: party bringing the action in a court of law

Plenary: complete; entire; full

Police power: natural power of the state to control health, welfare, comfort, and prosperity of its people

Ratification: confirmation of an act done either by the party himself or by one of his agents

Reasonable: just; proper

Statute: law enacted by the legislative power in a country or state

Verdict: the decision of a jury reported on the matter at hand to the court

Writ: a judicial process, such as a notice to appear, or to enforce legal obedience to an order of the court