CHAPTER ELEVEN

SCHOLASTIC POLITICS

America was settled long after the church had ceased to be a primary factor in the emerging power politics of the modern era. Mortmain and the dissolution of the monasteries in England broke its independent economic base. The national church establishment replaced the vision of Christendom. Many functions of the church were absorbed by the state. Poor relief was one of these and the Elizabethan poor law was meant to fill a recent void. In due course, education was similarly taken up by the state. Luther's Germany and Calvin's Geneva initiated systems of universal public education. They served the double purpose of creating an educated citizenry and reproducing the Protestant character of the Reformation. A century later, the Puritans of Massachusetts followed suit.

The jurisdictional rivalry between church, state, and family is today nowhere more evident than in education. Each claims a distinct purpose and interest in the instruction of its members, citizens, and heirs. At times, each has been loath to recognize a higher interest or authority than its own. Yet nowhere is there a greater community of interest than in education. It originated amidst the early cooperation between church and state. Its purposes were equally republican and Christian. The dissension that accompanied the transition from common schools to a system of public schools exemplifies the growing
religious and political strains that preceded the Civil War and continued for some time afterward. By its nature, education is a constitutional issue of the first magnitude.

The Public Education Movement

The Northwest Ordinance of 1787, which anticipated the Constitution in many details, paid special attention to religious liberty and the encouragement of education in the opening words of its third article: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." But there was nothing new about this official interest in public education. The Pilgrims and Puritans of colonial New England also held education in very high regard. In the estimation of Moses Coit Tyler:

The proportion of learned men among them in those early days was extraordinary. It is probable that between the years 1630 and 1690 there were in New England as many graduates of Cambridge and Oxford as could be found in any population of similar size in the mother-country. ... Only six years after John Winthrop's arrival in Salem harbor the people of Massachusetts took from their own treasury the funds with which to found a university; so that while the tree-stumps were as yet scarcely weather-browned in their earliest harvest-fields, and before the night howl of the wolf had ceased from the outskirts of their villages, they had made arrangements by which even in that wilderness their young men could at once enter upon the study of Aristotle and Thucydides, of Horace and Tacitus, and the Hebrew Bible.

By 1649, public instruction had been made compulsory throughout New England except in Rhode Island. In fact, the modern ideal of an educated citizenry had emerged only a century earlier under similar circumstances in western Europe. Ellwood Cubberley attributed its original impetus to the Reformation:
Under the new theory of individual responsibility promulgated by the Protestants the education of all became a vital necessity. ... The modern elementary vernacular school ... may be said to be essentially a product of the Protestant Reformation. This is true in a special sense among those peoples which embraced some form of the Lutheran or Calvinistic faiths.

Just as the English chancellor—a clergyman—had formerly been keeper of the king's conscience, the university served this function in Lutheran Germany, which indicated the high level of public respect for its ministry. But state control of the new primary school was rejected at first, even though the reformers were dependent on state or municipal authorities to compel school attendance. Only much later did state school systems develop, first in Prussia and then in France, during the Enlightenment and following the French Revolution. Voluntary, church-supported school systems prevailed until 1870 in England, where separate Anglican and Nonconformist schools operated freely.

The tradition of limited government in America may help account for the public ambivalence toward public schools throughout the nineteenth and into the twentieth century. Many supporters of tax-supported public education enlisted the same arguments that long had been used to justify tax support for the "public Protestant teacher of piety, religion, and morality" and compulsory attendance upon his instruction. They recognized in the new state systems of public education a ready instrument for encouraging religion and morality as well as knowledge among those who lived outside the direct influence of the churches.

Stephen Colwell counseled the Protestant churches of his day to set aside their sectarian rivalries:

No denominational jealousy is exhibited among Protestants when men read the Bible without a clerical expositor at their side; neither can they feel any when it is read to, or by the children, in the
public school; nor when its contents are explained without any view to those special theological distinctions which mark the lines of separation between Churches.

Opponents, on the other hand, emphasized the dangers of political and religious tyranny. The Presbyterian theologian, Archibald Alexander Hodge, warned of its secularizing effects:

It is capable of exact demonstration that if every party in the State has the right of excluding from the public schools whatever he does not believe to be true, then he who believes most must give way to him that believes absolutely nothing, no matter how small a minority the atheists or agnostics may be. It is self-evident that on this scheme, if it is consistently and persistently carried out in all parts of the country, the United States system of national popular education will be the most efficient and wide instrument for the propagation of Atheism which the world has ever seen.

In England, John Stuart Mill expressed a comparable concern:

The objections which are urged with reason against State education, do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education: which is a totally different thing. . . . A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

But the motives that guided both sides in the controversy were many and varied. In the frontier settlements, the chief supporters and leaders of public education were often ministers. As David Tyack has suggested: "There the issue of church and state may more profitably be examined in terms of clerical influence rather than sectarian control." ¹¹

The prevailing view of the struggle over public schools is still largely the one provided by Horace Mann and virtually graven into stone by Ellwood Cubberley. David Tyack noted in 1966 that most textbooks in
American educational history followed the latter's "use of Massachusetts and New York as paradigm cases of church-state relations in the nineteenth century" and observed:

The role of ministers in the common school awakening is far less clear and familiar than their work in founding colleges. Indeed, through many accounts of the public school movement in mid-nineteenth-century America runs a strain of anti-clericalism, as if Horace Mann, fresh from his squabbles with the orthodox clergy in Massachusetts, were dictating the text. As a result, ministers have not won recognition for their contribution to public education, nor has the Protestant coloration of the common school been examined sufficiently. One reason for this neglect is that most of the early studies were "house histories," stories written by school administrators or by education professors who chose to disregard ministers because they were outside the profession of teaching, strangers at best and mischievous meddlers at worst. An essential part of the creed of these early educational historians was that schooling should be secular, public in support and control, and managed by professionals. It was axiomatic to them that secularization meant progress, Samuel Eliot Morison has written, and that "schools inspired by the spirit of religion, or conducted by ecclesiastics, are worthless."

But current educational history is no longer so closely wedded to the orthodoxy of an earlier generation of educators.

Some public education advocates regarded compulsory school attendance as the linchpin in their efforts to assert professional control over the tax-supported schools. Massachusetts led the way with the first compulsory school attendance law in 1852. Cubberley himself noted the dual purpose:

Everywhere the right of the State to compel communities to maintain not only the old common school, but special types of schools and advanced training, has been asserted and sustained by the courts. Conversely, the corollary to this assertion of authority, the right of the State to compel children to partake of the educational advantages provided, has also been asserted and sustained by the courts.

When taken individually, tax support of schools and compulsory school attendance laws do not necessarily create the conditions or the
attitudes that tend to be associated with monopolies. But taken
together, they do little to discourage the natural tendency by the state
to favor public schools, sometimes to the point of impeding the
operation of private schools. The financial impediments acknowledged by
Justices Jackson and Rutledge are only part of the story. Although
early attempts to shut down private and parochial schools were thwarted
by the courts or failed in the legislatures, some states today have
lately sought to enforce detailed regulations that tend to dilute the
differences between public and private schools. Recent and continuing
efforts by several states to close unaccredited church schools and home
schools are perhaps best understood in light of an educational
monopoly.

This monopoly issue is one of fundamental constitutional
significance. Through the cooperation of all levels of government, the
civil state has become ultimately responsible for financing public
schools, regulating them through grants-in-aid programs, setting
curriculum standards, compelling attendance, licensing or otherwise
regulating nonpublic schools, accrediting teachers, and establishing
teachers colleges. In addition, the historical record lends ample
support to the suspicion that many of those who initially lobbied for
public schools and universities sought to promote or reinforce rising or
reigning orthodoxies. Like so many public education advocates, Thomas
Jefferson drew on the language of religion when describing his vision of
the future for which such—in this case, the University of
Virginia—were to serve as midwives:

It is in our seminary that the vestal flame is to be kept alive;
from thence it is to spread anew over our own and the sister
States. If we are true and vigilant in our trust, within a dozen or twenty years a majority of our town legislature will be from one school, and many disciples will have carried its doctrine home with them to their several states, and will have leavened the whole mass.\textsuperscript{15}

What these words suggest is the very sort of molding of opinion that John Stuart Mill found so disturbing a power to vest in the state. The imposition or maintenance of an ideological orthodoxy is rarely avowed as a goal by public education advocates, yet it has been indirectly suggested in a variety of ways. Horace Mann, for example, regarded public education as a means of shaping character and reforming behavior: "Let the Common School be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine-tenths of the crimes in the penal code would become obsolete. . . ."\textsuperscript{16} Mann was criticized by the Association of Boston Masters for promoting radical ideas, like the infant school system, phrenology, and an equal ratio of teachers to students.\textsuperscript{17}

In very similar terms, James G. Carter commended the establishment of institutions for the education of teachers: "An institution for this purpose would become by its influence on society, and particularly on the young, an engine to sway the public sentiment, the public morals, and the public religion, more powerful than any other in the possession of government."\textsuperscript{18} Carter equated the state--as sovereign--and the government when he wrote that the teachers' college "should be emphatically the State's institution. . . . If it be not undertaken by the public and for public purposes, it will be undertaken by individuals for private purposes."\textsuperscript{19}

It is perhaps this potential for imposing an ideological orthodoxy
that aroused the strongest opposition and posed the greatest danger to constitutional limitations. The founders were guided by a belief that governmental power must be restrained because it tends naturally toward tyranny. Later, in remarks that dealt specifically with the Sixteenth Amendment, John W. Burgess formulated a test for the constitutionality of governmental powers based on this philosophy of limited government:

What is genuine constitutional Government? It is not simply a Government based on a written document, without regard to whence that document came and what it provides. Genuine constitutional Government rests upon two fundamental principles, principles without which, whatever else it may be, it is not genuine constitutional Government. These two principles are, first, that it must be representative Government and, second, that it must be limited Government. That is, first, there must be back of government a more ultimate authority, which decrees the organization of the Government, vests it with powers, and imposes upon it limitations. This body or organization we denominate in political science the sovereign. Now, in genuine constitutional Government this body must not govern. If this body should govern, such Government would necessarily be absolute and unlimited, since, as the original and most ultimate authority in the order of authorities, there would be nothing back of it which could control or restrain it.

But this is not yet enough for the establishment of genuine constitutional Government must be representative Government, but representative Government can exist without being genuine constitutional Government. Let us suppose, for example, that there exists in a given political system a sovereign power organized back of, separate from, and supreme over the Government, but that it should vest all of its own power without exception or limitation in the Government, or all of its power in regard to certain most important subjects in the Government, such a Government would be representative, but it would not be constitutional in any true and genuine sense of the word. It would be an absolute Government, in whole or part, no matter how benevolently disposed. In order to be constitutional it must be subject to limitations imposed upon it by the sovereign in behalf of the Rights and Immunities of the individual. Constitutional law is a body of limitations on governmental power and you dare not call any document a Constitution, no matter from what source it may come, which is not such. It would not solve, in the slightest degree, the great problem of political history and political science, the reconciliation of Government with Liberty. It would simply sacrifice Liberty to Government.
Religion and Education

The thesis that public education is an establishment of religion or an attempt to create a new consensus is not a new idea by any means. Supporters and opponents were equally impressed with the religious and moral influence of public schools. Horace Mann often extolled the virtues of teaching the Bible as a means of inculcating Christian morals. His conservative critics did not object to instruction in the Bible so much as derogate the kind of "non-sectarianism" that was taught. As David Tyack pointed out, they "feared that he was smuggling Unitarianism into the curriculum."22

A major factor in the original success of the public education movement was the perceived need to channel the waves of new immigrants into the mainstream of American life. An overriding purpose of public education, then, was assimilation into a particular cultural value system. This still appears to be the guiding purpose with respect to unassimilated ethnic groups. But assimilation must be directed by means of a set of commonly accepted norms. These norms, in turn, derive from religious sources, however much educators may attempt to detach them from their dogmatic roots. Religious diversity has made it impolitic for public schools to favor explicitly denominational standards. But critics from a variety of religious viewpoints often have little difficulty in recognizing the religious presuppositions—particularly those they find objectionable—that infuse everything from curriculum requirements to teaching techniques.24

Nineteenth-century Catholics criticized the public school system for attempting to detach their children from the Catholic faith.
Immigrant groups in general and Catholics in particular were suspected of cherishing allegiances to foreign sovereigns. Indeed, Catholic schools were typically held in official disregard. One leading citizen of Boston was quoted as saying that "the only way to elevate the foreign population was to make Protestants of their children." Michael Katz's comments on the attitudes of public school officials make the controversy sound as contemporary as the furor over fundamentalist Christian schools and home school programs.

In their report for 1854 the school committee complained that the parochial schools (they termed them "Romanist") had undermined educational planning. Catholic children were leaving and re-entering school at such an erratic pace that no enrollment predictions could be made. Even more serious, the very children "emanating from a class of our population so destitute of domestic advantages, as to make them special candidates for all the benefits of our school system" had been removed from the influence of excellent teachers and facilities and placed in decidedly inferior institutions.

But in the eyes of many Catholic families the religious bias of public education was everywhere to be seen. That same year, the Supreme Court of Maine upheld in Donahoe v. Richards, 38 Me. 376 (1854), the expulsion of Bridget Donahoe from a public school in Ellsworth for refusing to join in reading the King James version of the Bible. State courts normally upheld mandatory Bible reading—whether in the King James or the Douay version or both—on the grounds that "the Bible is not a sectarian book." It is thus evident that whether or not public schools ever represented an establishment of religion in the constitutional sense, they played a very similar role at one time and, like Sunday closing laws, may even yet be structured according to the assumptions of the establishment tradition even though they are outwardly secular.
Secularization was originally offered as the solution to sectarianism in the classroom. Its application to public education significantly anticipated the desegregation policies of more recent times. Alexander Bickel recognized a continuity of purpose between Americanization and later desegregation programs: "Performance of the assimilationist function required government-owned and government-managed schools, the presence in the classroom of children of all nationalities, religions, and classes, and the de-emphasis of factors like religion, which divided rather than united the children."^29^ The pattern or policy of pluralism in public education makes particular sense if seen in comparison with the ancient Roman strategy of breaking down parochial exclusivism and forging a new standard for unity by appearing to embrace all competing loyalties.^30^ Although the ideal of universal religions may be well described by the motto *e pluribus unum*, the biblical religions honor doctrinal truth over ecumenical unity. Instead of agreeing that "all roads lead to Rome," a Christian school is apt to reply that "strait is the gate, and narrow is the way, which leadeth unto life, and few there be that find it" (Matt. 7:14). The differences of attitude are profound. Each view is exclusive in its own way and certainly exclusive of the other. Alexander Bickel quoted Justice William Brennan's opinion in the Schempp case as an illustration of the secularist rationale:

"... the American experiment in free public education" has evolved to the point where the schools now "serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."

The mission of the public school so conceived would have required
not only compulsory free public education, but exclusive free public education. 31

Such exclusivism was clearly the object sought by Wisconsin, Nebraska, Iowa, and Oregon when they attempted to restrict private education or, in the case of Oregon, abolish it altogether. 32 But the Court's Pierce decision of 1925 did not end such political interference with private education. Regulation—or subsidization—is a far more effective mechanism for control than prohibition. While the Court ruled out the destruction of private education as a legitimate means of ensuring educational conformity, it did not refute the logic of the position these states took. Felix Frankfurter, who welcomed the Court's rulings in the Meyer, Pierce, and Bartels cases, later wrote the majority opinion in the Gobitis case and dissented when this compulsory flag salute ruling was reversed three years later. 33 It is only to be expected that public and private schools will operate somewhat at cross-purposes if there are meaningful differences between them. The secular purpose of public education is assimilation to a common pluralism. Its primary effect is to avoid and even downgrade what is considered parochial, divisive, or separatist, as Justice Brennan's remarks in his Schempp opinion appear to indicate. 34 Short of an exclusive and universal free public education, the next best means at the state's disposal is to set detailed curriculum, accreditation, and testing standards.

Regarded in this light, the Supreme Court's series of decisions concerning aid to church-affiliated schools assumes a different character. Even its accommodationist rulings make eminent sense in view of this secular purpose of consensus-building. In the Everson case, the
Court upheld aid to the parents of school children in the form of reimbursement for public transportation costs. In the Wolman case, it approved the loan of textbooks to individual students, the supplying of state-mandated standardized tests and scoring services, the provision of speech and hearing diagnostic services as well as specialized remedial, therapeutic, and guidance services by school board employees. More recently, the Court upheld a Minnesota law granting state income tax deductions for private school tuition in Mueller v. Allen, 103 S.Ct. 3062 (1983), a matter that promises further litigation in the future. Justice Rehnquist, who wrote for the majority in this five to four decision, maintained that the only source of entanglement was the requirement that officials determine whether particular textbooks qualify for the deduction. Justice Marshall, who wrote for the dissenters, agreed that the deduction did not completely subsidize the religious schools. But he noted that under the Nyquist rule no subsidization is permissible unless it is restricted to the purely secular functions of a school.

These decisions were not outwardly designed to advance the cause of religious free exercise and the Court treated the religious issue as a minor consideration in the framework of a legitimate secular purpose. As Justice Harry Blackmun wrote in the Wolman case: "Providing diagnostic services on the nonpublic school premises will not create an impermissible risk of fostering ideological views; hence there is no need for excessive surveillance and there will not be impermissible church-state entanglement" (433 U.S. 229, 230). Religion was weighed in the balances and found wanting.
But some critics contend that a strictly secular purpose is no more neutral with respect to religion than a clearly religious or antireligious bias. Whatever else may be said about it, David Martin, James Hitchcock, Harvey Cox, and other students of the subject have shown that secularization—and even secularism as a philosophy of life—is an outgrowth, a reflection, and in part a rejection of biblical religion. 35

Two issues that have frequently been raised are, first, whether state-mandated curriculum standards and teacher certification requirements inhibit the free exercise of religion and, second, whether such regulations serve as vehicles for an establishment of religion. John Whitehead and John Conlan, for example, have insisted that changes in judicial doctrine are in effect establishing a religion of secular humanism:

Judicial relativism deposits "raw power" in the hands of State institutions and, in particular, the courts. "In these circumstances the order of society and the established human rights are in no way protected against arbitrary power, and there is no reason why the discernment of right and wrong should not be given over to an all-powerful State charged with making its own criteria." The chance of an imposed order becoming a reality in the modern technological State is imminent. The tide of totalitarianism can be stemmed by recovering the dignity of Man based in the creature-Creator relationship. Moreover, to prevent an imposed State order, Secular Humanism must be finally recognized as a religious ideology and its unconstitutional establishment within our governmental organs must be prohibited. 36

Paul Toscano echoes these complaints from a different religious perspective:

... the Court not only forbids government from aiding theism, but it also implies, in the name of religious neutrality, that traditional, theistic religion should not exert any influence on government or on government institutions (including public schools), thus relegating traditional religious beliefs and convictions to an inferior status in the political arena. By so
doing, the Supreme Court has embarked upon a trend toward the establishment of national secularism, a trend that raises many troublesome questions. Should strongly held beliefs, especially with regard to education and curriculum, be restrained simply because the majority feels such beliefs are religious? If so, how can religious beliefs be avoided in American education?  

John Remington Graham, on the other hand, believes that critics who single out this epicurean tradition for attack miss the point. He has emphasizes that educators should not be "condemned for attempting to teach children how to think in moral terms. No education would be sufficient, or even possible, without instruction concerning what ought to be, as well as what is." Graham suggests that, given the broad definition of religion, the religious nature of education be acknowledged and that government support of education be maintained "so long as religious neutrality is observed."  

This brings the controversy back full circle and raises the question whether there exist any religiously neutral values or norms by which schoolchildren may--and should--be socialized and educated. This question may be posed even more directly in terms of the the three criteria of the Supreme Court's establishment clause test: a secular purpose, a neutral primary effect, and the absence of an excessive entanglement with religion. Can state regulation of expressly religious schools--through licensure, accreditation, or teacher certification--pass muster under this three-pronged test and, if so, to what extent? The same question may be asked about state financing of expressly non-religious schools in which free religious expression is unwelcome or views are taught that contradict religious doctrines.  

Finally, does the Supreme Court's own establishment clause test even pass its own test of neither advancing nor inhibiting religion? If the
problem is primarily one of definition, then it might be further asked whether there is a single definition of religion that will allow all of these questions to be answered in the affirmative.

Writing shortly after the Seeger decision of 1965, Marc Galanter described what he called the "new latitudinarianism:

In the process of avoiding the constitutional question, the Court has broadened its notion of religion to include all beliefs which are sincere, meaningful, and paramount in the lives of their holders. Thus the theistic element of the earlier view of religion is supplanted, and with it the application of any "objective" criterion of the boundaries of religion is rendered extremely difficult. There now remains no valid test of the content of a claimed religious belief--neither its truth, good sense, comprehensibility, theism, or its acceptance by an organized group. Courts may, at the most, apply general tests of psychic function--or, when dealing with institutions, of institutional form and functions.

This confounding of the boundaries between sacred and profane things further suggests that the institutional forms and functions of the modern state, which are derived from a tradition of hierarchical religion, incorporate one realm as much as the other.

Conduits of Regulation

The public education movement was a natural response to a genuine need created by the industrial revolution and it still bears the imprint of its origins. But the electronics revolution of recent years promises to gradually undercut the centralizing tendencies that resulted in the great "paleotechnic" institutions, as Lewis Mumford has called them, including factories, great bureaucracies, penitentiaries, standing armies, and centralized educational systems. The growing interest in home education, for instance, is well-supported by the new communications technology at a time when the possibilities for
sophisticated educational experimentation as well as parental dissatisfaction and taxpayer resentment over current policies have perhaps never been greater. New options are coming within financial reach for less affluent families. Current school financing practices are likely to eventually give way to alternative methods that reflect the growing decentralization of education and correspond with the decentralization of work.

Given the pressing financial, educational, and discipline problems of schools in general, however, there is likely to be much resistance to alternative systems that may further tax the capacities of established public school systems. The present system of school financing contains built-in incentives to reduce competition and limits programs to a fairly narrow range of selection. Enriched programs are often criticized for elitism and for that reason are particularly vulnerable to budget cuts. But an educational system that seeks primarily to reflect its community and reproduce a harmonious statistical bell is unlikely to appeal to families with different aspirations, who would likely turn elsewhere given the opportunity.

Many families with children in private religious schools are dependent on the availability of aid. But whether for grade school or college, the government has become the major supplier or guarantor of school aid. Such assistance, however, carries the hazard of entangling recipient schools in the strings that are normally attached to government grants. Several private colleges began discovering a few years ago that tuition aid to students, for example, was being used as a means of compelling them to comply with a variety of regulations that
would otherwise not apply. In a case involving Basic Educational Opportunity Grants (BEOGs), which are conditioned on a school's compliance with the sex discrimination guidelines of Title IX of the Education Amendments of 1972, the Court has recently seen fit to limit the impact of this stipulation to the specific program receiving the funds. As Justice White wrote in in *Grove City College v. Bell*, 104 S.Ct. 1211 (1984):

In defending its refusal to execute the Assurance of Compliance required by the Department's regulations, Grove City first contends that neither it nor any "education program or activity" of the College receives any federal financial assistance within the meaning of Title IX by virtue of the fact that some of its students receive BEOGs and use them to pay for their education. We disagree (104 S.Ct. 1211, 1216).

In a footnote, Justice White drew an analogy between what the college termed "indirect aid" and the coverage of local school districts that receive federal funds through state educational agencies. As a result of the decision, this Presbyterian college, which wants "to truly remain independent of government intervention," has decided to seek other means of funding student aid.

Although this ruling probably falls more into the accommodationist than the separationist category, accommodation in this case means that aid is available to those schools that will comply with or accommodate themselves to the policy agenda of the state. In recent years, the state has become a major supplier or guarantor of loans and other aid. This gives it a commanding position in the market and an ability to regulate the supply as well to control access.

But the conduits of regulation are many and varied. If there are any effective limits at all, they may be political rather than
constitutional in nature. According to Stephen Pepper, only twice in its history—the Sherbert and Yoder cases—has the Court extended First Amendment coverage on the sole basis of the free exercise clause by restricting a law considered religiously neutral on its face and in its intent. After the Court's ruling in the Lee case, in which an Amish employer who was himself exempt was required to pay social security taxes for his employees, Pepper concluded that the "first amendment doctrine protecting freedom of religious conduct is in significant disarray."44

Now that tax exemptions are effectively being treated as subsidies rather than immunities, as may be concluded from the decision in Bob Jones University v. United States, 103 S.Ct. 2017 (1983), it is unclear whether independence of government intervention exists in more than a figurative sense. For example, the tax subsidy and charitable public trust concepts provided California with a rationale for requiring churches to forsake political activity. The fact that a church or a school has incorporated in order to limit their liability, hold property in perpetuity, and enjoy a tax-exempt status subjects it to corporate regulations that are entangling by their very nature. In the eyes of the law, only its legal alter ego—the religious corporation—exists. The communion of the saints has no standing before the bar.

In addition to such voluntary entanglements, there are others that may be unavoidable. A sweeping view of the commerce clause, for example, opens up other regulatory possibilities that are arguably limited only by political realities or by the First Amendment in general.45
R. Scott Tewes, who finds it difficult to justify revoking the tax exemptions of Bob Jones University and the Goldsboro Christian Schools under existing free exercise doctrines, has suggested two courses by which the neutrality principle may be upheld:

Congress could legislate to revoke the tax exemptions along with those of all other nonprofit organizations. While it would make the schools subject to taxation, such action would do nothing to deter the racially based policies of the schools. Alternatively, under an extremely broad reading of the thirteenth amendment, Congress could prohibit all private discrimination. By defining discrimination in this manner, the act could prohibit the schools' racially based policies. This action, if valid, would stretch the thirteenth amendment to its limits for the purpose of outlawing the religiously motivated practice of a few religious groups. Accommodating the groups seems a small concession in exchange for continued religious and individual freedom.46

But it is such options as these and similar courses of action that have created the greatest consternation in the religious community. This is evident in the support given to the Bob Jones University's position by various religious organizations.47 Although there is little general sympathy with racial classifications, churches are not unaware that even more sensitive categories are now, or in the future may be, subject to antidiscrimination laws. Under the regime of a state church, such direct intervention is to be expected. But under constitutional guarantees of religious liberty, the state must observe definite limits to the pursuit of its social as well as its fiscal and educational interests. Even where a compelling state interest is at stake, the Court has required that the least intrusive means of accomplishing it be used. Even so, in the absence of a definition of religious belief and conduct, such as that set out in the Davis test oath case, the free exercise guarantees are likely to continue to be subsumed under the establishment clause or other First Amendment provisions and their
applications will remain unpredictable.

Cases and Controversies

The crux of the rivalry between church and state—the bottom line for both of them—is, as always, who will determine the shape of things to come. The issue for churches often comes to the flashpoint when they are forced to defend standards of theological integrity that run directly counter to prevailing currents of thought in academia, in the chambers of government, or in the larger community. The state, on the other hand has an interest in maintaining public order and may see its interest to extend to exposing school children to a variety of experiences and influences that are thought to broaden their minds. There is much that may be said in favor of both views, but both cannot equally hope to prevail.

The question of final authority cannot be evaded. After being charged with corrupting the youth of Athens, Socrates was democratically tried, condemned, and given hemlock. Community standards prevailed. Yet history has been more kind to Socrates than to Athens. Likewise in the matter of educational standards today. For every accusation that parents and churches are corrupting the minds of young people, or censoring—even burning—books, there are similar accusations that schools are turning the hearts of children against their families, or that religious books are being censored.48 When one person's literature is another person's religion, the controversy over censorship—to cite one among many problem areas—eventually deteriorates into a question of personal predilections, as the Supreme Court bears witness.
State-mandated curricula and classroom reading selections invariably founder on the sort of perplexities that inspired Justice Potter Stewart's remark in *Jacobellis v. Ohio*, 378 U.S. 184, 196-97 (1964) concerning "hard-core pornography" that, although he could not define it, "I know it when I see it..."

Compulsory school attendance laws and federal aid to education have naturally bred a series of subsidiary requirements that are supposed to help determine whether proper educational and social standards are being met by all schools. Although some states, like Oregon, do not even require that private and home schools acknowledge their existence by registering with education office, the proliferation of grant programs has created a web of regulation that is increasingly difficult for a school of any appreciable size to escape. The possession of state approval and certified teachers is the secular equivalent of an imprimatur in the eyes of many of the families for whose patronage a private school must compete. In addition, states may offer attractive incentives—such as grant money, student aid, or special services—to induce schools to comply with their standards. For religious schools that are hard-pressed for money, such offerings may be difficult to resist and are potentially divisive. In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 775 (1976), Justice John Paul Stevens voiced his concern over the "pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."49 It is a remarkable fact that schools begun by churches for religious purposes so often forsake their affiliation and become secularized. While it is not possible to attribute this tendency
to a single factor, undoubtedly incentives to conform to state guidelines and the financial realities of keeping a school competitive with state-subsidized schools have been factors in many cases.

The winnowing process appears to particularly affect older, well-established institutions, especially those that have grown along fixed academic and budgetary lines. But it is with the small, often resource-poor fundamentalist schools that the greatest conflicts have been occurring. Not only are they often the least open to outside influence, they are also the most resilient in resisting what they regard as encroachments by the state.

State regulations take a variety of forms. Accreditation of schools is one means of assuring that certain minimum standards will be met. While accrediting associations are nominally private agencies, they are usually dominated by tax-supported institutions and exercise quasi-governmental power. Oral Roberts University (ORU) pressed a complaint against the American Bar Association (ABA) after the ABA denied accreditation to the University's law school on the grounds that the law school's religion-based admissions and faculty hiring standards—along with its lack of salary parity with similar schools in the same geographical area—violated its rules. ORU objected that the ABA was using its monopoly power over law school accreditation in restraint of trade. The ABA changed the rule in 1981.50

Curriculum standards and teacher certification are other means of control. Three cases involving fundamentalist Christian schools were among the early causes célèbres that aroused fundamentalist political activism. The first case was State v. Whisner, 47 Ohio St. 2d 181
At issue was the applicability of state-mandated curriculum standards to private religious schools. Among the requirements at issue was the following: "... All activities shall conform to policies adopted by the board of education." (The contention is advanced by appellants that this standard virtually provides a blank check to the public authorities to control the entire operation of their school.) William Ball, who represented Pastor Levi Whisner of Bradford, Ohio, later reflected on the case: "In the Whisner case, certain religious institutions, as the price of their existence, were commanded to comply with provisions contained in a volume bearing the Aesopian title, 'Minimum Standards.' The book was 125 pages in length and contained some 600 'minimum standards.'" When questioned during the trial, witnesses for the State admitted they did not expect full compliance but could not define what constituted "reasonable compliance." The Ohio Supreme Court ruled that these requirements substantially infringed on the religious liberties of the defendants, all of whom had been convicted of criminal failure to send their children to school.

In Kentucky State Board for Elementary and Secondary Education v. Rudasill, 589 S.W.2d 877, cert. denied, 446 U.S. 938 (1980), the Kentucky Supreme Court rejected the state's claim of authority to certify teachers in private schools and approve the textbooks. One of the expert witnesses for the appellees, Donald Erickson, commented: "The organizational structure of a school, in its formal and informal aspects, far from being a mere container into which ideas of many sorts can be poured, is itself a potent instrument, a 'hidden curriculum,' for
socializing children to particular lifestyle.\textsuperscript{54} George Huntston Williams, a church historian, further stated:

Education is an integral part of the mission of any church for its own people and for others as well. \ldots I do not believe that the certification which is now mandated by the Legislature is itself entirely legitimate because these teachers in many cases are ministers. Surely the State would not have the right to interfere, to make judgment as to the qualifications of a minister. In fact, in these religious schools, the clergy are very frequently and prominently in the position also of teachers. This is the way it was in antiquity; this is the way it was in the 16th Century; this is the way it was in the beginning of our own school system in New England and elsewhere in this country before we became a republic.\textsuperscript{55}

Rousas John Rushdoony added a theological analysis:

In fundamentalist religious teaching is required a strict adherence to Scripture. The State, according to Romans 13, is a ministry under God and a ministry of justice. \ldots So that our offices of state are, to a fundamentalist, religious officers whether or not they have faith. They are accountable, therefore, to God.\textsuperscript{56}

The Court cited the debates over the language of the original compulsory school attendance law in Kentucky and the Beckner amendment, which provided "that in the future there shall be no provision made requiring those who are conscientiously opposed to sending their children to public schools to do so."\textsuperscript{57} Since that decision, the conflict has shifted to state approval or licensure to the schools themselves.\textsuperscript{58}

The third case was State of North Carolina v. Columbus Christian Academy, No. 78-OVS-1678 (1979), which was made moot by a new law that excluded "nonpublic education from all education laws except those dealing with fire, safety, sanitation, and immunization."\textsuperscript{59} The Academy had "challenged the state regulation of private schools in the areas of teacher certification, curriculum, length of school day and school year, health certification, and student inoculation."\textsuperscript{60}

Direct licensure of church-affiliated schools has arisen as an
issue occasionally. In **New Jersey State Board of Higher Education v. Board of Directors of Shelton College**, 90 N.J. 470 (1982), the New Jersey Supreme Court issued a permanent injunction against the college, which is operated by Bible Presbyterian Church, restraining it from awarding credits or degrees without a license from the State Board of Higher Education. But most such litigation involves primary and secondary schools. Some states have held firm in their commitment to state approval, while others have been moving in the direction of the Whisner precedent. Though some states may yet appeal court rulings in favor of the church and home schools, others have conceded.61

The state that has stirred the most controversy over its school certification requirement is Nebraska, one of a handful of states that still apply fairly stringent approval standards for private schools. Nebraska schools are required by law to register with the state, employ as regular teachers only certified graduates of approved college teacher-training programs, observe mandatory curriculum standards, administer standardized tests, and provide a library containing at least a specified minimum number of books, no more than which a very small percentage can be religion-oriented.62 Some exceptions have been made and enforcement has been fairly selective in some parts of the state. But the Amish communities and fundamentalist churches have been the most visibly affected. By 1983, some twenty-two churches had joined together to oppose the law.

The case that has received the most publicity involves Faith Baptist Church in Louisville. The pastor of the church, Rev. Everett Sileven, started a weekday school in the church basement in 1977.
Litigation began a few months later and culminated in an unfavorable ruling against the church in *Douglas v. Faith Baptist Church*, 301 N.W. 2d 571, cert. denied, 102 S.Ct. 75 (1981). But the school continued to operate. Shortly before classes were scheduled to open in the autumn of 1982, the school was ordered closed by the sheriff. At one point, Rev. Sileven was arrested in the church sanctuary while meeting with the students and jailed for contempt of court. He eventually served out the full four-month sentence. When the school continued to meet, the church doors were padlocked between regular church services and protesting ministers were bodily removed by sheriff's officers. Some of the parents were charged with violating the truancy law.

The case caught the attention of the national news media late in 1983 when seven fathers of the schoolchildren were jailed shortly before Thanksgiving and remained in jail for more than three months. Their wives and children meanwhile had taken refuge across the state line. A panel was appointed by Governor Robert Kerrey to investigate the situation. Late in January the panel declared that the teacher certification procedures violated the free exercise rights of Christian schools and recommended that church schools be exempted. Following several attempts, legislation to relieve the churches was finally passed in March. The new law is scheduled to take effect in July. But Rev. Sileven was arrested and jailed again upon returning to the state late in April of 1984. As of this writing, the issues still await a full resolution. Similar incidents have taken place in Lincoln, York, North Platte, and Grand Island, including cumulative fines at one school and the search and seizure of school files at another.
Federal regulations have also been a source of friction. On August 21, 1978, IRS announced a "Proposed Revenue Procedure on Private Tax-Exempt Schools" designed to determine whether private schools have racially discriminatory policies that disqualified them for tax exemption. This aroused considerable opposition from religious groups throughout the country and IRS received approximately 125,000 letters of protest. When hearings were held late that autumn, state and local leaders from almost every state testified against the procedure. Nearly 120 members of Congress were included in the state delegations. For several years afterwards, the Ashbrook and Dornan Amendments were attached to appropriations bills to prevent enforcement of the procedure.65

The proliferation of Christian day schools in recent years, which James Carper has termed "the first widespread secession from the public school pattern since the establishment of the Catholic schools in the nineteenth century,"66 has also been broadening in scope through the home school movement. It may be expected that much of the new legal ground here will be broken by litigation over home schools in coming years. Here the appeal is not to the free exercise rights of church-related ministries but the rights of parents and families, whether or not these are understood in terms of religious conviction. Historically speaking, home education enjoyed priority in the American colonies and during much of the nineteenth century. E. Alice Law Beshoner commented on the nature of the transition to public education:

The state assumed the role of aiding the parents in the task of preparing their offspring for adulthood by providing state-supported "free" schools to which the parents could, if they chose, delegate some portion, or all, of this parental
responsibility. Thus, the important issue in the first half of the nineteenth century was not whether the state could compel school attendance, but whether or not parents could demand that the state aid them in their duty at public expense. The issue was resolved in favor of the parental demand and resulted in the rise of large tax-supported systems of elementary schools in the North. Although viewed as an "aid" to the parent, the establishment of public education in the North, and, after the Civil War, in the South, had the ultimate effect of eroding the common law parental right over a child's education. 67

As Charles Burgess has noted, the reassertion of the old Roman law doctrine of parens patriae—which had earlier been used by the state to take custody of infants whose persons or property had been violated—and the extension of its concept of infancy well into the teenage years were contributing to this erosion of parental rights by the turn of the century. 68

Although it is too early to predict how the courts will divide the issues in the growing controversy over home education, the argument is being made in some circles that the state lacks a compelling interest in requiring certification of teachers and equivalency of curriculum if it cannot even demonstrate a correlation between compliance with these standards and the educational achievement of students. 69 At one point, the compulsory school attendance law of North Carolina, which had been modified to accommodate the objections of Christian schools, was ruled unconstitutional by a federal district court because of its lack of equity as applied to home education: "If the state makes no attempt to maintain minimal educational standards in nonpublic schools, its requirement that a school be attended is little more than empty coercion, particularly when those children are in fact being relatively well educated at home." 70 The state's interest in the education of school age children, including its authority to set minimum standards,
has been consistently upheld in the courts, but the constitutional boundaries of its interest and authority are being tested in great detail. Litigation is being used to establish precedents and each side seeks test cases in which it can work from a position of strength. But as has often been said, "hard cases" establish bad precedents. 71

Particular regulations are vulnerable to challenge unless a compelling state interest can be shown and unless the least restrictive means of enforcing that interest are used. A "clear and compelling proof" standard of evidence, as opposed to a preponderance of the evidence standard or a balancing test, has been suggested by some critics as the best way to secure the preferential position of religious liberty. 72 The proliferation of new varieties of nonpublic schools has resulted in numerous gradations between traditional church schools and home schools. Resolution of the competing interests between curriculum standards, compulsory school attendance requirements, parental choice, and religious liberty is likely to eventually require policies that apply to all nonpublic school alternatives equally. Thus issues of religious liberty for church schools and parental choice appear to be inseparably linked in the larger context of civil liberty.

Despite the increasing proportion of litigation involving nonpublic schools, public education controversies, where the free exercise and establishment concerns were first raised, have not disappeared. Old battles over school prayer, Bible reading, and released time for religious classes have been supplemented by others, such as the teaching of the creation account of origins, the distribution of religious literature on campus, and the holding of religious meetings by students.
Two decades after the Supreme Court's Engel and Schempp rulings against prayer and Bible reading, faculty members, elected officials, and school boards continue to ignore or actively resist the letter and spirit of these rulings. In Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), affirmed, 455 U.S. 913 (1982), a federal court struck down a Louisiana policy permitting classroom teachers to ask whether any interested student would like to offer a prayer at the start of the school day. In Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U.S. 863 (1981), another federal court ruled that permission may not be granted to a student council request to choose members of the student body to open each school assembly with a prayer.

The issues persist not simply out of habit or defiance but very often because of the strong religious significance attached to public gatherings. The word church or congregation originally meant a public assembly for worship. Public meetings were traditionally opened with prayer, a custom which persists—despite its religious origins—in state legislative assemblies and Congress today. While the religious content of particular customs—like civil ceremonies and holidays—may change, their significance as religious exercises appear to be widely understood and accepted. Similarly, there is little doubt about the religious origin and significance of Sunday closing laws despite the Supreme Court's ruling in the McGowan case that they had evolved into a secular and religiously neutral designation of a public day of rest. The official purpose attributed to sabbath laws is often less significant to supporters than the fact of their continued observance.
The issues have raised civil religious observances occasionally provoked spirited dissents from the federal bench. Justice Brennan's dissent in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983), made clear that he did not regard historic precedent for the opening of a legislative session with prayer by a paid chaplain—as a defense against its unconstitutionality as an establishment of religion. Justice Douglas had earlier hinted much the same thing in his Engel concurrence. The problem here is the ambiguous meaning of the First Amendment language as applied by the Fourteenth Amendment. The wording of the two clauses—"respecting an establishment" and "prohibiting the free exercise"—is not directly parallel. The Supreme Court, however, has construed them as parallel restraints and has given them equal weight in application. This may be a source of the tension or conflict that allegedly exists between the two clauses. Consequently, their respective claims are sometimes balanced. But disagreements have persisted and the high level of litigation is one indication of both the lack of public consensus and the strength of continuing oppositions to separate religion from public life.

One example of this lack of public consensus is the school prayer issue. Since the Engel and Schempp decisions of two decades ago, bills have been repeatedly introduced and sometimes debated on the floor of Congress. Despite its symbolic importance, it reflects a conscious association of religion and education in the minds of many people. For this reason, it is likely to remain a matter of continuing interest despite uncertainties about the place of religion, if any, in the public school classroom. One Vermont teacher, Peter Huidekoper, believes that
school prayer or a moment of silence is not the issue:

It is not the moment of silence, then, that concerns us most. It is a whole school day of silence about God, an attitude that restricts and endangers truly free inquiry and open discussion about matters if they happen to take on a religious nature. It is this silence, this attitude, that concerns us very deeply. . . . We must return to a teacher's essential task: to stretch the imagination. And we must remember that we diminish the intellectual and spiritual growth of our students when we succumb to the current absurdity that simply to speak of God of religious values and beliefs is—Lord help us—against the law. 74

A recent opinion by a federal judge in a school prayer case, Jaffree v. James, 544 F.Supp. 727, 732 (1982), which challenged what he called "judicial fiat," held:

The case law, in the opinion of the Court, has overlooked the totality of what is religion in its consideration when deciding issues under the establishment clause of the Constitution. The background of this country and its laws is one based upon the Judeo-Christian ethic. It is apparent from a reading of the decision law that the Courts acknowledge that Christianity is the religion to be proscribed. . . . The religions of atheism, materialism, agnosticism, communism and socialism have escaped the scrutiny of the courts throughout the years, and make no mistake these are to the believers religions; they are ardently adhered to and quantitatively advanced in the teachings and literature that is presented to the fertile minds of the students in the various school systems. If the courts are to involve themselves in the proscription of religious activities in the schools, then it appears to this Court that we are going to have to involve ourselves in a whole host of areas, such as censorship, that we have theretofore ignored or overlooked.

In Jaffree v. Board of School Commissioners, 103 S.Ct. 842 (1983), Justice Powell reinstated an injunction against school prayers in Alabama and the Supreme Court rejected the school prayer law in Wallace v. Jaffree, 104 S.Ct. 1704 (1984). But Judge W. Brevard Hand's earlier dismissal of the suit in Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (1983), evoked memories of an older custom, interposition, which likewise had religious origins, particularly in the Calvinist view that lesser magistrates may interpose their authority when a higher
In a number of recent controversies, conflicting precedents have been set by the federal courts, adding further confusion. For example, a student-sponsored prayer group in one public school was ruled unconstitutional in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), but a similar prayer group in another public school was upheld under free speech protections in *Bender v. Williamsport Area School District*, 563 F.Supp. 697 (M.D.Pa. 1983). One indication of a possible favorable ruling in these cases by the Supreme Court is that it upheld such meetings on a state university campus in the *Widmar* case, ruling that students must be allowed equal access to public forums for religious functions. But the Court has usually shown itself more favorably disposed toward liberal standards at the college level because of the comparative maturity of the students. An attempt by Congress to address the issue failed in May of 1984.

Another area of controversy that has received considerable attention in the press from time to time is the teaching of evolution or, alternatively, the teaching of creation in public school classrooms. The *Scopes* trial of 1925 in Tennessee, which was one of the memorable events of that period, culminated decades of what Andrew Dickson White termed "the warfare of science with theology." But it was not until the *Epperson* case in 1968 that the Court struck down a law prohibiting the teaching of evolution in public schools. Mississippi was the last state to repeal a similar law in 1972.

Attention has lately shifted to state laws requiring equal time for creation or a balanced treatment of evolution and creation as theories
of origins. Some states, like Oregon, have taken a permissive position on the question, allowing local school districts the option of including or excluding the teaching of creation along with evolution in biology classes. But a federal court ruled against an Arkansas statute requiring balanced treatment in McLean v. Arkansas Board of Education, 529 F.Supp. 125 (E.D.Ark. 1982). More recently, the Louisiana Supreme Court has upheld a similar law in that state.76 Advocates of "scientific creationism" contend they are able to avoid overt religious teaching by confining their endeavors to considering scientific evidences for creation. Opponents claim the issue is not a scientific question at all but strictly a religious one. Whatever the merits of the particular arguments for or against the teaching of creation alongside evolution in public schools, the exclusive teaching of evolution as a theory of origins clearly raises serious questions about the possibility of religious neutrality in the classroom where an established scientific or ideological orthodoxy competes to a greater or lesser degree with a traditional religious orthodoxy.77

Families that hold clear convictions concerning textbooks have typically been responding by withdrawing from the public school system. Along with the lack of religious teaching, dissatisfaction over the curriculum and textbooks have been among the many factors which have strengthened the Christian school movement in recent years. In this respect, the current issues and responses are not materially different from the reaction of Catholic families in the nineteenth century to what they regarded as the teaching of Protestant values in public schools. They may or may not have been mistaken about the purpose of
the public schools but these families judged them by their fruits.

Conclusions

The innumerable conflicts that have arisen over the setting of the educational agenda are unlikely to be resolved through legislation or adjudication by the courts. The persistence of many issues reflects real—perhaps growing—divisions over the place of the family, church and state in community life. As symptoms of cultural disintegration and reorientation they might best be regarded as warning signals rather than political problems that have direct or immediate solutions. When confronted by two women who claimed the same infant, King Solomon did not solve the problem by dividing the child between them. He wisely avoided the obvious dilemma by judging their motives and convictions.

The interests of the state in fostering education have been clearly asserted from the earliest period of American history. Common schools were publicly supported in many parts of New England as early as the 1640s. The Northwest Ordinance of 1787 set aside public land for the support of schools in the federal territories. Thus public aid for education has been the earliest expression of the state's interest. After the late 1830s, the public school movement and, later, compulsory school attendance laws began to spread across the country. Parochial school systems developed in response to the perceived religious bias of the tax-supported schools. In more recent years, the Christian school movement has grown in response to the secularization of public schools. Considerable controversy is centered on religious activities in public schools and the availability of public funds for nonpublic schools. The
jurisdictional boundaries between family, church, and state are not clearly drawn in current law, which has had the result of making it difficult to sort out competing interests and bringing them into constitutional harmony. This as increasingly become a matter left to the arbitration of the courts, perhaps in part by default, at a time of rapid cultural change.

But the recognition of education as a ministry of the church is again gaining increasing acceptance in otherwise disparate religious circles. The extent and limits of the state's interest in regulating church and home schools have consequently become subjects of political controversy. Some churches and families see the issue as unfriendly political interference, while some public educators regard the issue as one of preserving school systems as enrollments decline and the portion of families with children in public schools declines. Many regulations are suspected of deliberately making private schools less competitive with public schools by establishing mandatory standards that tend to either dilute essential differences in the educational product or raise the operating costs of the schools. The burdens, however, tend to be inhibitory rather than prohibitory. Few states have adopted regulations that clearly restrict religious liberty.

Thomas Vitullo-Martin notes that "the potential for powerful control of private schools . . . is not yet developed. The enforcement of state regulations on private schools is not highly directive." But the lobbying on all sides of various educational issues, like tuition tax credits and lower school attendance age requirements, has been intense in recent years. Tuition tax credits have been described by the
National Education Association as a vehicle for creating an educational caste system because of the exclusivity of nonpublic schools. The American Civil Liberties Union has similarly complained about credits because of the lack of regulation of private schools by the state. Whether or not tuition tax credits or education vouchers ever generally prevail, supporters would do well to consider their potential for entanglements and a resultant demand for greater regulation of private education. Wisdom dictates avoiding unnecessary dilemmas.

Seen purely as a problem in political pragmatics, the protection of religious liberty in private and public education requires that at a minimum the close tie between tax-support for schools and compulsory school attendance laws be weakened or severed. One proposal is to end the state establishment of schools in favor of competitive private school systems. While this is the goal of libertarians like Murray Rothbard and Joel Spring, it is gaining support from other quarters.

Another possibility would be to require some level of tuition to be paid by all families, not just those that reside outside the district. But neither course is likely anytime soon unless economic conditions or public attitudes radically change. Rockne McCarthy, James Skillen, and William Harper believe that there must be a redefinition of public responsibility for education along with greater recognition given to parental responsibility and a redesign of public funding procedures. Stephen Arons believes that any solution requires at least the following elements:

First, a state's school-financing system may not condition the provision of free education upon the sacrifice of First Amendment rights. Second, a state may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, permit educational
choice for affluent parents while inhibiting it for poor parents. Third, state regulation of private schools may not substantially affect value inculcation within them unless there is a compelling state justification for doing so.

In the meantime, religious liberty is being defended in some quarters as a constitutional right that is second to none. This carries a risk that the judicial balance may be tipped toward license on the part of some avowedly religious organizations, as the Ballard, Saia, and Terminiello decisions arguably did in the past. But while deterrence is a legitimate public expectation when respect for law rules, the reconstitution of law requires first of all a citizenry willing to take responsibility for assuring public justice. It is here that the interests of religion and politics must converge if free institutions are to be maintained.
Notes


4 Eugen Rosenstock-Huessy, Out of Revolution: Autobiography of Western Man (New York: William Morrow and Company, 1938), pp. 267, 398. Rosenstock commented that the Lutherans regarded teaching as a public trust. "The German professor was always careful to keep as part of his title the addition, "Public Professor," in order to make clear his political sovereignty. . . . A systematic and hard-thinking mind was required to follow this long campaign against so many papal traditions point after point, paragraph after paragraph, brick after brick, so to speak, the whole framework of the old visible church was to be tested and rebuilt, lest the new learning lose its reason for existence. Every year brought a new question; but not one of these questions could be treated alone. . . . The little pebble flung by the thesis of a young German scholar seems to us now nothing more than a pebble, and in Anglo-Saxon countries, with their eye for particulars, the idea of the Ph. D. thesis as a pebble still prevails. But in Germany this pebble was David's pebble hurled at Goliath. Any dissertation might dislodge the keystone from the Holy Sepulchre of the real Christian faith, as Luther's ninety-five theses had done in the year of salvation 1517."
Ibid., pp. 397, 398, 399.


8 Ibid., p. 106.


10 John Stuart Mill, "On Liberty," in The Essential Works of John Stuart Mill, ed. Max Lerner (New York: Bantam Books, 1961), pp. 351, 352. Similarly, Bennett Puryear, a professor at Richmond College, "argued that free public schools would result eventually in state paternalism. He pointed out that a free state system would bring compulsory education, and in time cause the common wealth to provide free books, free lunches, and free clothes. The whole system, he argued, was contrary to the original principles of our government, which guaranteed the freedom of every citizen to manage his own affairs under the protection, but without the interference of the state." Charles William Dabney, Universal Education in the South, vol. 1 (Chapel Hill: The University of North Carolina Press, 1936; reprint ed., New York: Arno Press, 1969), pp. 153-54. The author also commented on the famous debate between his father, Rev. Robert Lewis Dabney, and Dr. William H. Ruffner, the superintendent of schools in Virginia. Ibid., pp. 154-61.


12 Ibid., pp. 448-49.


14 Ibid., p. 356. See State v. Bailey, 157 Ind. 324 (1901), which upheld the constitutionality of the state's compulsory education law.


17 Ibid., p. 237.

18 Rushdoony, Messianic Character, p. 38.

19 Ibid., p. 38.


21 This fact has been variously interpreted. See, for example, Rushdoony, Messianic Character, p. 31.


28 The one nineteenth-century exception was State ex rel. Weiss v. District Board, 76 Wis. 177 (1890).


30 An illustration may be taken from the textbook standards for New York public schools cited by Justice Douglas in his dissenting opinion.
in Board of Education v. Allen, 392 U.S. 236, 256 (1968): "The material is to 'promote the objectives of the educational program,' 'treat the subject competently and accurately,' 'be in good taste,' 'have a wholesome tone that is consonant with right conduct and civic values,' 'be in harmony with American democratic ideals and moral values,' 'be free of any reflection on the dignity and status of any group, race, or religion, whether expressed or implied, by statement or omission,' and 'be free of objectionable features of over-dramatization, violence, or crime.' Gerrit Wormhoudt made some similar observations: "Whether the values of Galbraith, Skinner, Dewey, or anyone else have become an unofficial dogma for modern educationists, a dogma that is uniformly dispensed by them through institutions that are governmentally supported, is not the critical point. . . . The important thing is to recognize that all teaching and all teachers are laden with values and beliefs that touch upon every aspect of human destiny: 'We should not let ourselves be deceived by the belief that public schools are neutral about religion. . . . The religion that inspires a public school, despite the pose of neutrality, will be one of the traditional faiths, or a crusading zeal for social reform, or some other holy cause.'" Gerrit H. Wormhoudt, "Supreme Court Decisions," in The Twelve-Year Sentence, ed. William F. Rickenbacker (New York: Delta, 1975), pp. 81-82.

31 Bickel, Supreme Court, p. 124. After contending that in the absence of state aid the private school sector will be seriously weakened by school closures and deterioration in quality, Otto F. Kraushaar complained: "Such a development would be viewed by single-minded advocates of public education as a consummation devoutly to be desired. Following the lead of Horace Mann's messianic vision of public schools' mission, they maintain that the public schools alone are the great engine of Americanization. Until quite recently the public school was identified by many Americans as a sacred institution, a bulwark of American society, of whose benevolent ministrations no child school be deprived." Otto F. Kraushaar, American Nonpublic Schools: Patterns of Diversity (Baltimore: The Johns Hopkins Press, 1972), p. 299. An example of a plea for greater singleness of purpose in American education may be found in Urie Bronfenbrenner, Two Worlds of Childhood: U.S. and U.S.S.R. (New York: Basic Books, 1970; Pocket Books, 1973), pp. 156-70. For a critique of the social conditioning techniques of the highly centralized system of state schools in Sweden, see Roland Huntford, The New Totalitarians, revised ed. (New York: Stein and Day, 1980), pp. 204-249.

32 Sydney E. Ahlstrom, A Religious History of the American People, vol. 2 (Garden City, N.Y.: Image Books, 1975), p. 306. David Tyack attributes the Bennett Law and the Edwards Law in Illinois to a combination of nativism, ethnic jealousies, and other motives. School officials were generally more interested in seeking consensus and avoiding partisan controversy. Tyack, One Best System, p. 109. The appeal to a value-neutral professionalism was by then becoming part of the ideological arsenal of what has been termed "the reform style of politics." See Murray S. Stedman, Jr., State and Local Governments, 2nd

33 Bickel, Supreme Court, pp. 25, 123

34 Justice Brennan nevertheless believed that uninhibited freedom of choice between public and private education was constitutionally reserved to the parents. Bickel disagreed that this was the effect of the Court's ruling: "It remains a gross overstatement to say, as Justice Brennan has done, that the First Amendment forbids the state 'to inhibit' the individual's choice 'between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own.' The public schools are free, supported by public funds to which everyone, including parochial-school parents, contributes their taxes; private schools still have little if any access to public funds, and must be supported out of private pockets. . . . Another aspect of the accommodation is a measure of control by the state over indoctrination administered to its future citizens in private schools." Bickel, Supreme Court, p. 125 and note.

35 David Martin, A General Theory of Secularization (New York: Harper & Row, 1978), pp. 278-305; James Hitchcock, What Is Secular Humanism? Why Humanism Is Becoming Secular and How It Is Changing Our World (Ann Arbor, Mich.: Servant Books, 1982). Theologian Harvey Cox distinguished between secularization and secularism. Harvey Cox, The Secular City: Secularization and Urbanization in Theological Perspective (New York: The Macmillan Company, 1965), pp. 20-21: "Secularism . . . is the name for an ideology, a new closed world-view which functions very much like a new religion. While secularization finds its roots in the biblical faith itself and is to some extent an authentic outcome of the impact of biblical faith on Western history, this is not the case with secularism. Like any other ism, it menaces the openness and freedom secularization has produced; it must therefore be watched carefully to prevent its becoming the ideology of a new establishment. It must be especially checked where it pretends not to be a world-view but nonetheless seeks to impose its ideology through the organs of the state." Federal grant programs, for example, often serve as vehicles for ideological special pleading. This observation has not been confined to any particular position on the political spectrum. See, for example, Michael Parenti, Democracy for the Few, 2nd ed. (New York: St. Martin's Press, 1977), pp. 275-87; Grant McConnell, Private Power and American Democracy (New York: Vintage Books, 1966), pp. 339-40; "How Washington Funds the Left," Conservative Digest, April, 1982, pp. 1-54.

phrase may be part of its attraction. While some critics use the term pejoratively, "secular humanism" lacks the unpleasant connotations of names like Yankee, Tory, or Quaker, which, like bigot, were originally hostile epithets. The word "humanism" is not to be found in Noah Webster's 1828 American Dictionary. It appears to have been coined by Samuel Taylor Coleridge, who influenced the American Transcendentalists. It originally meant "belief in the mere humanity of Christ," which was also the original, theological meaning of "humanitarian." Oxford Universal English Dictionary on Historical Principles, rev. ed. (1937), s.v. "Humanism." Walter Lippmann later used the word in its current sense as a secular religion when he argued that humanism as a moral philosophy represented the only civilized alternative to theism. Walter Lippmann, A Preface to Morals (New York: The Macmillan Company, 1929), pp. 133-39. The first Humanist Manifesto (1933) identified humanism as a religion. See also Corliss Lamont, The Philosophy of Humanism (New York: Philosophical Library, 1957), pp. 1-23.


39 A recently released study by Peter Ferrara shows that during the last twenty years, in which First Amendment speech, press, and assembly guarantees have been extended to a broad array of student activities comparable religious liberties have been considerably narrowed. Peter J. Ferrara, Religion and the Constitution: A Reinterpretation (Washington: Free Congress Research and Education Foundation, 1983), pp. 1-13.


41 The term "paleotechnic" was coined by Lewis Mumford and is used in Lewis Mumford, Technics and Civilization (New York: Harcourt, Brace & World, 1934), pp. 210-11. Mumford regards the industrial or paleotechnic period as a transition phase. Other commentators, like Marshall McLuhan and Walter Ong, have agreed.

vulnerable to this assault, since the federal government now disperses contract funds among colleges and universities which run to billions of dollars a year. The funding continues to grow. The Carnegie Commission on Higher Education has recently urged that federal funding to higher education be increased to some $13 billion a year. The one who holds the purse strings rules the home. The dominant position of the government in regulating the money markets deserves greater scrutiny. Small private colleges that become dependent on public aid often face the dilemma of having to abandon their sectarian identity or close their doors. See C. Stanley Lowell, ed., Impact of Federal Aid on Private and Church Related Institutions of Higher Learning (Silver Spring, Md.: Americans United Research Foundation, 1977), p. 9: "The State of Alabama offers an example. In recent years three church-affiliated colleges have terminated their affiliation and become state-supported institutions." Lowell noted that federal aid makes recipient schools susceptible to lawsuits and investigations: "A shining example of bureaucracy gone mad is provided by the recent event in which the President of the United States had to intervene personally to keep H.E.W. from prohibiting father and son banquets in school districts on the ground that they were a form of sex discrimination barred by Title IX!" Ibid., p. 8.

43 Martin Mawyer, "Grove City College Wins Its 'Title IX' Case," The Moral Majority Report, April, 1984, p. 3, 22.


45 On the extension in meaning of the power to regulate commerce to include production, see Edward Jerome, The Problem of the Constitution (New York: Longmans, Green and Co., 1939), pp. 160-69. According to Kelly and Harbison, the "stream of commerce" doctrine, which was devised by Justice Holmes in Swift & Co. v. United States, 196 U.S. 375 (1905), "provided a logical premise under which production itself could later be held to be a part of commerce." Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 5th ed. (New York: W. W. Norton & Company, 1975), pp. 569. This power was further extended to private discrimination when the Court upheld Title II of the Civil Rights Act of 1964. Kelly and Harbison commented: "The time-honored distinction between state and private action, which even now the Court had carefully preserved, promised in the future to become increasingly sterile." Ibid., p. 895.


47 The following religious organizations submitted amicus briefs in favor of the university: Church of God in Christ, Mennonite; General Conference Mennonite Church; Church of Jesus Christ of Latter-Day Saints; National Association of Evangelicals; National Committee for
Amish Religious Freedom; Christian Legal Society; Worldwide Church of God; National Jewish Commission on Law and Public Affairs; and the American Baptist Churches in the U.S.A., joined by the United Presbyterian Church in the U.S.A. The latter underscored what it regarded as the primary issue in the case: "Amici are agreed that racism is wrong and that Petitioner's reading of what the Bible teaches about human relations is faulty. However, the wrongness of racism cannot be the real issue in this case. As this Court said in Commissioner v. Tellier, 383 U.S. 687 (1966) at 691: 'We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. The I.R.S. has used its asserted power under §501(c)(3) as a sanction against what it unilaterally determines to be wrongdoing but which Petitioner asserts is not wrongdoing but simply the following of sincere religious beliefs.'" The brief added: "The very existence of a religious organization is at stake in this case. Chief Justice Marshall, speaking for the Court in M'Culloch v. Maryland, 4 Wheat. 316 (1819) at 431, stated that the power to tax involves the power to destroy. Even if the power to tax does not involve the power to destroy, it does involve the power to define and control--an such power, when applied to religious organizations, is contrary to the letter and the intent of the religion clauses of the First Amendment." Earl W. Trent, Jr. and John W. Baker, Brief Amici Curiae of the American Baptist Churches in the U.S.A. Joined By the United Presbyterian Church in the U.S.A., p. 14. In addition to several secular organizations, the American Jewish Committee and the Anti-Defamation League submitted amicus briefs on behalf of the respondents. The brief from the United Churches of Christ sought dismissal because it regarded the case as moot.

48 For comparison, see Stephen Arons, Compelling Belief: The Culture of American Schooling (New York: McGraw-Hill Book Company, 1983), pp. 3-13, on "Book Burning in Warsaw," written from a libertarian viewpoint; Cal Thomas, Book Burning (Westchester, Ill.: Crossway Books, 1983), pp. 44-71, on "Censorship in the Name of the Constitution" and "Chaos in the Classroom;" Franky Schaeffer, A Time for Anger: The Myth of Neutrality (Westchester, Ill.: Crossway Books, 1982), pp. 26-46, on "The Myth of Neutrality in the Media." In the Stone case, the Court ruled that the avowed secular purpose behind the posting of the Ten Commandments on the walls of public classrooms was insufficient to avoid conflict with the First Amendment: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments" (449 U.S. 39, 42). But if sacred literature may not enter the sanctuary of the public classroom, a number of federal court rulings suggest that nothing profane may be excluded from it. See, for example, Right to Read Defense Committee of Chelsea v. School Committee of City of Chelsea, 454 F.Supp. 703 (D. Mass. 1978); Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969). See also U.S. Library of Congress, Congressional
The Tilton and Hunt cases, which were discussed in Chapter Nine, also involved religious colleges. The aided institutions had to show that they were predominantly secular or were not pervasively religious.

See Religious Freedom Reporter, 2 (September 1982): 251-52, on the lawsuit and the American Bar Association's subsequent revision of Standard 211 to allow religiously-based law schools to admit students and hire faculty on the basis of religious belief.


See Board of Education v. Minor, 23 Ohio St. 211, 249-51 (1872), for comparison.


Ibid., p. 76.

Ibid., p. 84.

Ibid., p. 192.


61 The West Virginia legislature granted church schools relief from regulation in 1983. "West Virginia Legislation Exempts Christian Schools," The Briefcase (Christian Law Association, Cleveland, Ohio), June, 1983, p. 1. In Michigan, a circuit court ordered an injunction restraining the state from enforcing the requirement that all teachers employed by nonpublic schools must be certified by the state and that the course of study be of "the same standard" as public schools in the local district. See Religious Freedom Reporter, 3 (January 1983): 10-11. More recently, a federal district court in Bangor Baptist Church v. State of Maine, Department of Educational and Cultural Services, 576 F.Supp. 1299 (D. Maine 1983), held that the compulsory education statutes of Maine do not prohibit unapproved schools from operating. It awarded declaratory and injunctive relief: "Any action brought against plaintiff pastors, administrators or church schools for inducing truancy by 'preaching' that the Bible commands fundamentalist Christians would certainly 'restrain orderly discussion and persuasion,' Thomas v. Collins, 323 U.S. at 530, 65 S.Ct. at 322" (576 F.Supp. 1299, 1334). The suit was brought by the 23 member Maine Association of Christian Schools, which was founded in 1979 two years after the Bangor Baptist Church sought an exemption from a requirement that its school submit a detailed five-year plan for approval.


63 Both public and official opinion have been sharply divided over the case, which is one of several such cases. The local press has been uniformly unfavorable to the school's stand and unhappy with the national media coverage. See the following editorials: "Confrontation at Louisville Spurs Threat of Mob Rule," Omaha World-Herald, 20 October 1982, p. 32; "Church School Conflict Issue Still Unchanged After Six Years," Lincoln (Nebr.) Journal, 14 December 1983, p. 14; "Defense of Faith Christian Reflects Some Distortions," Omaha World-Herald, 15 December 1983, p. 32. But some local residents and officials have taken
a different view. In the Douglas case, Chief Justice Krivosha dissented: "I find nothing either in our statutes or in logic which compels a conclusion that one may not teach in a private school without a baccalaureate degree if the children are to be properly educated. Under our holding today, Eric Hoffer could not teach philosophy in a grade school, public or private, and Thomas Edison could not teach the theory of electricity. While neither of them could teach in the primary or secondary grades, both of them could teach in college. I have some difficulty with a law which results in requiring that those who teach must have a baccalaureate degree, but those who teach those who teach do not (301 N.W.2d 571, 582-83)." Timothy Binder, a law student, commented: "The decision will unnecessarily place individuals in a position where they must make a choice between their God and their government; it will not be 'unreasonable' for those individuals to choose to obey their God and suffer punishment at the hands of their government." Timothy J. Binder, "State v. Faith Baptist Church: Under Constitutional Scrutiny," Nebraska Law Review, 61 (1982): 96. This case has been most widely publicized in church circles. See H. Edward Rowe, The Day They Padlocked the Church (Shreveport, La.: Huntington House, 1983); Robert McCurry, "Sheriff and State Police Drag Worshipers from Church," Temple Times (East Point, Georgia), October 31, 1982, pp. 1-4; Robert McCurry, "Judge Uphold Police in Dragging Worshipers from Worship Meeting and Padlocking Church Building," Temple Times, September 4, 1983, pp. 1-4. A lawsuit brought by sixty-six plaintiffs against state and local officials was dismissed on the grounds that they were immune while acting in an official capacity, "even if maliciousness is alleged." National press coverage began in earnest shortly after the arrest of the seven fathers. See Tom Breen, "Bible-school Crusaders Besiege Nebraska Town," The Washington Times, 1 December 1983, p. 4A; Deborah Frazier, "Preachers Wage a Holy War in Nebraska," Rocky Mountain News (Denver), 12 December 1983, pp. 7-8; James Kuhnhehn, "Liberty Church Becomes Sanctuary for Fugitives in Church School Fight," The Kansas City Times, 19 December 1983, pp. A-10, A-16; Patrick J. Buchanan, "Educational Rebels in Nebraska May Spark Next Social Revolution," Omaha World-Herald, 10 December 1983. See also Metts, Your Faith, pp. 123-24; George Hansen, To Harass Our People: The IRS and Government Abuse of Power (Washington, D.C.: Positive Books, 1984), pp. SS12-SS20.

64 For information on some of the other Nebraska cases, see Advance, October 1982, published by the Christian Legal Defense and Education Foundation of Jacksonville, Florida; The Briefcase, June 1983, published by the Christian Law Association of Cleveland, Ohio; Nebraskans for Religious Liberty, "A Report to the People of Nebraska."


66 James C. Carper, "The Whisner Decision: A Case Study in State
Regulation of Christian Day Schools," Journal of Church and State, 24 (Spring 1982): 281. Carper acknowledges the difficulties in obtaining reliable figures on the growth of enrollment in evangelical Christian schools since the mid-1960s, but estimates current (1981) enrollment at approximately one million pupils in five to six thousand schools. He terms the growth rate "phenomenal."


Ibid., p. 195. Another critic, a Catholic, likewise disputed the pretension that public education would cure crime by making some crude statistical comparisons between states with public schools and those without, which he offered in support of his successful bid to be confirmed Assistant Attorney-General during the Cleveland Administration. Zach. Montgomery, Poison Drops in the Federal Senate: The School Question from a Parental and Non-sectarian Stand-point (Washington: Gibson Bros., 1886), pp. p-20.

68 Charles Burgess, "Growing Up Blighted: Reflections on the 'Secret Power' in the American Experience," in The Public School Monopoly: A Critical Analysis of Education and the State in American Society, ed. Robert B. Everhart, Pacific Studies in Public Policy (Cambridge, Mass.: Ballinger Publishing Company, 1982), p. 44. Such patriarchal, patriotic ideas seem to have guided the General Education Board's endeavors to bring rural Southerners into the twentieth century: "Is there aught of remedy for this neglect of rural life? Let us, at least, yield ourselves to the gratifications of a beautiful dream that there is. In our dream, we have limitless resources, and the people yield themselves with perfect docility to our molding hand. The present educational conventions fade from our minds; and, unhampered by tradition, we work our own good will upon a grateful and responsive rural folk. We shall not try to make these people or many of their children into philosophers or men of learning or of science. We are not to raise up from among them authors, orators, poets, or men of letters. We shall not search for embryo great artists, painters, musicians. Nor will we cherish even the humbler ambition to raise up from among them lawyers, doctors, preachers, statesmen, of whom we now have amply supply. We are to follow the admonitions of the good apostle, who said, 'Mind not high things, but condescend to men of low degree.' And generally, with respect to these things, all that we shall try to do is just to create presently about these country homes an atmosphere and conditions such, that, if by chance a child of genius should spring up from the soil, that genius will surely bud and not be blighted. Putting, therefore, all high things quite behind us, we turn with a sense of freedom and


71 For example, "sweetheart suits" have been brought by private organizations against government agencies in order to set up test cases expected to produce a mutually satisfactory result. See "Green Saga Continues," The Advocate, January 1981, p. 15A. Justice Holmes coined the term "hard cases" in his dissent in Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).


74 Peter Huidekoper, Jr., "God and Man In the Classroom," Newsweek, April 2, 1984, p. 17.


78 Education appears to have been a joint responsibility of the church—or congregation—and the family in biblical times. Deut. 6:6-9; Matt. 28:19. See E. C. Wines, The Hebrew Republic (Uxbridge, Mass.: American Presbyterian Press, n.d.), pp. 44-53. Christian Reconstructionists like R. J. Rushdoony, who support this view, have
enjoyed a strong influence in Fundamentalist and Charismatic circles despite their Calvinist theology.


83 Quoted in Ibid., p. 125.