

NOTES

STATE REGULATION OF PRIVATE CHURCH SCHOOLS: AN EXAMINATION OF VERMONT'S ACT 151

I. INTRODUCTION

The late 1970s and early 1980s have seen a revival of the fundamentalist religious movement in America.¹ Fundamentalism, which embodies many religious variations within its scope, is generally a belief in living by a literal interpretation of the Bible and apart from the "liberal" aspects of society.² Because of the fundamentalists' strong antipathy towards the secular values taught in public schools,³ fundamentalist private schools are forming in this country at the prolific rate of three a day.⁴ At present, approximately 20,000 such schools are in operation in this country.⁵ One

1. Benson, "Bible Right" to Take Liberals to Task, News and Observer (Raleigh, N.C.), Oct. 21, 1979, § 1, at 2, col. 2. The "New Right" has allied itself with fundamentalist leaders on issues such as abortion, the Equal Rights Amendment, homosexuality, pornography, national defense, and sex education and prayer in schools. *Id.*

2. IV A. PIEPKORN, PROFILES IN BELIEF: EVANGELICAL, FUNDAMENTALIST, AND OTHER CHRISTIAN BODIES (1979).

3. D. Kilmartin, A Freeman's Report to the Governor and the General Assembly of the State of Vermont on the State Board of Education's Attempts to "Approve, Control, Regulate, Qualify or Certify" Public and Private Efforts in Educating Child Inhabitants of the State of Vermont Who Are Between the Ages of 5 and 18; the Use of Federal, State and Local Tax Burdens as a Mechanism to Destroy Private and Parental Educational Initiatives and Capabilities, the Failure of State Government to be Accountable to the Freemen of Vermont for the Effective Use of Public Funds in Primary and Secondary Education 8-9 (on file with the Vt. Dep't Educ.) [hereinafter cited as Freeman's Report]. "It can be proved to any openminded person, beyond any doubt whatsoever, that the secular Caesar is sponsoring, promulgating and propagandizing the new atheistic religion where man, in all his selfishness, is the new god and the secular State is the super-god." *Id.* Mr. Kilmartin, an attorney and self-proclaimed "Christian . . . of the State of Vermont," *id.* at 12, makes two assertions in his report: (1) the state does not have the power to regulate Christian schools by law and (2) the state should not have the power to regulate a minimal level of education, because state educational standards are so inadequate. In support of this second assertion, Mr. Kilmartin offered *Help! Teacher Can't Teach!*, TIME, June 16, 1980, at 54-63, as an appendix to his report.

4. G. Maeroff, *Protestant Schools Open at a Rate of Three a Day*, N.Y. Times, Feb. 10, 1981, at C1, col. 2. Paul Kinel, executive director of the Association of Christian Schools International in LaHabra, California, made this estimation based on the association's statistics. He also asserted that, in 1980 alone, the association grew from 1294 schools with 220,000 pupils to 1482 schools with 289,000 pupils. *Id.*

5. *Christian School Exemption: Hearings on S.R. 52 Before the Senate Educ. Comm.*,

commentator has estimated that "if present rates of growth continue, Christian schools will outnumber public schools by 1990."⁶

A recurring conflict between the fundamentalist ministry and state governments centers upon whether the state has a right to regulate the education of its citizens who attend private religious schools. Every state has had to deal with this question in recent years and each has developed its own response.⁷ The volume of litigation⁸ in this area has encouraged many state legislatures to reassess state regulation of private schools, and some legislatures have chosen to deregulate private education.⁹

The fundamentalists insist on a total absence of state supervision of their schools as a right of religious freedom. A fundamentalist leader in Vermont expressed this view: "We are very sensitive about intrusion . . . into the church by [state] presence which can be intimidating. [B]y virtue of bureaucracy, once it starts it goes further and further . . ." ¹⁰ Fundamentalists want no interference with their church-school operations by the public sector.¹¹ They see each of their churches and schools as necessarily autonomous and independent in its structure.¹² They feel state approval, in any form, is dangerous because it would lead to more and more regulation.¹³ These regulations might lead to a biased evaluation of

Bien. Sess., Jan. 29, 1981, at 4 (testimony of Rev. Paul Weaver, President of Christian Schools of Vt.) [hereinafter cited as *Senate Educ. Comm. Hearing*].

6. Raney, *Public School vs. Christian School—Which is Right for Your Child?*, 42, 42 MOODY MONTHLY (Sept. 1978).

7. See Nebraska Dep't Educ., Non-Public Schools Survey, 1981 (on file with Nebraska Dep't Educ. Approval and Accreditation) [hereinafter cited as *Nebraska Survey*]; Florida Dep't Educ., Governance of Private Schools Survey, 1981 (on file with Office of the Consultant for Non-Public Schools, Fla. Dep't Educ.).

8. See, e.g., *City of Chicago v. Bethlehem Healing Temple Church*, 93 Ill. App. 2d 303, 236 N.E.2d 357 (1968); *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966); *State ex rel. Douglas v. Faith Baptist Church of Louisville*, 207 Neb. 802, 301 N.W.2d 571 (1981); *Santa Fe Community School v. New Mexico State Bd. of Educ.*, 85 N.M. 783, 518 P.2d 272 (1974); *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980); *State ex rel. Nagle v. Olin*, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); *Roloff Evangelistic Enters., Inc. v. State*, 556 S.W.2d 856 (Tex. Civ. App. 1977); *State v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976).

9. N.C. GEN. STAT. §§ 115C-547-554 (1982) is an example of state deregulation. This statute, enacted April 24, 1979, exempts North Carolina's private religious schools from state curricular regulation.

10. *Senate Educ. Comm. Hearing*, *supra* note 5, at 8 (testimony of Rev. Paul Weaver).

11. *Id.* at 12-13.

12. *Id.* at 12.

13. *Id.*

the schools' teaching methods and textbooks.¹⁴ Reverend Weaver, a Vermont fundamentalist leader, explained: "We need our liberty to continue our religious objectives."¹⁵ The Vermont fundamentalists, therefore, sought exemption from state control for their church-schools: "[A]n exemption would be in order as long as we comply with compulsory education and with reasonable building and health standards. . . ."¹⁶

The fundamentalists base their desire for exemption on constitutional premises.¹⁷ They view their church-schools as pervasively religious and indivisible from the church.¹⁸ They argue that the school and church are incorporated as one unit and that education is a religious function. Neither the act of teaching nor the organizational structure of the "school," therefore, can be distinguished from the "church" itself.¹⁹ Consequently, the fundamentalists assert that state attempts to regulate attendance and quality of education in private fundamentalist schools involve excessive entanglement of government with religion in contravention of the religion clauses of the first amendment of the United States Constitution.

The state, on the other hand, typically views the church-related school as having two separable functions: religious indoctrination and secular education.²⁰ The state concedes that regulations that are so all-encompassing that they affect the ability of the church-school to perform its religious function²¹ violate the separation of church and state as contemplated in the first amendment.²² The state, however, asserts that it has the power reasonably to regulate private schools under its police powers:²³ to inspect the facilities for compliance with fire, health, and safety standards,²⁴ to examine pupil enrollment under its compulsory-attendance

14. *Id.* at 17.

15. *Id.* at 19.

16. *Id.* at 8.

17. *Id.* at 8, 13.

18. "[Our national group of pastors] view[s] our church-school . . . legally as one unit. They are incorporated as one . . ." *Id.* at 14.

19. "[O]ur schools and church are one. They are organized as one. The basic ministry of the church is education . . . It always has been." *Id.* at 4.

20. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925).

21. See, e.g., *State ex rel. Nagle v. Olin*, 64 Ohio St. 2d 341, 352, 415 N.E.2d 279, 286 (1980); *State v. Whisner*, 47 Ohio St. 2d 181, 207, 351 N.E.2d 750, 765 (1976).

22. 64 Ohio St. 2d at 350, 415 N.E.2d at 285; 47 Ohio St. 2d at 207, 351 N.E.2d at 765.

23. 268 U.S. at 534.

24. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

requirements,²⁵ and to require certain minimal educational requirements to prepare its citizens for assimilation into society.²⁶

The question of deregulation was the subject for heated debate in Vermont's legislature during 1981 and 1982.²⁷ On January 29, 1981, Senator Vincent Illuzzi introduced a bill exempting religious schools from state regulation by the State Department of Education.²⁸ Concurrently, the State Board of Education proposed amendments to Title 16, sections 166 and 1121 of the Vermont Statutes Annotated enabling the state more effectively to regulate private schools.²⁹ Shortly thereafter, Senators Scudder Parker, David Gibson, and Stewart Smith proposed a compromise bill that would provide consumer fraud-type protection for the parents of private school pupils. Under the compromise bill, parents would have a mechanism for filing complaints against private schools which are not meeting their state registration obligations.³⁰ The senate passed this bill on March 27, 1981, and the house added its refinements and passed it on February 17, 1982. A Committee of Conference was then appointed to coordinate the two drafts, and on April 13, 1982, the Governor signed into law this amended compromise.

It will be the purpose of this note to examine the constitutional propriety of state regulation of private sectarian schools, the reasons Vermont's pre-amendment statutes required reformation,

25. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. at 534.

26. See, e.g., *Lemon v. Kurtzman*, 403 U.S. at 613; *Board of Educ. v. Allen*, 392 U.S. 236, 246-47 (1968).

27. See, e.g., *Senate Educ. Comm. Hearing, supra* note 5 (deregulation of Christian schools); *Christian School Regulation: Hearings on S.R. 170 Before the Senate Jud. Comm.*, Bien. Sess., Mar. 25, 1981 (regulation of Christian schools) [hereinafter cited as *Senate Jud. Comm. Hearing*]; *Christian School Regulation: Hearings on S.R. 170 Before the House Educ. Comm.*, Bien. Sess., Feb. 4, 1982 (regulation of Christian schools) [hereinafter cited as *House Educ. Comm. Hearings*].

28. S. 52, An Act to Add 16 V.S.A. § 166a Relating to Religious Schools, Bien. Sess. (1981).

29. An Act to Amend 16 V.S.A. § 166 Relating to Approval of Private Schools, 1981, and An Act to Amend 16 V.S.A. § 1121 Relating to Compulsory Attendance and Truancy, 1981 (on file with Vermont Dep't Educ.). These amendments, although ratified by the Vermont State Board of Education, never gained a sponsor and, thus, were never formally proposed. However, when the Senate Education Committee met to discuss Sen. Illuzzi's bill, each committee member was provided copies of the State Board of Education's proposed bills and the Senate committee members referred to the board's bills on the record during that meeting. Telephone interview with Robert B. Luce, Counsel for Vermont Dep't Educ. (October 15, 1981).

30. S.R. 170, Bien. Sess. (1981); *Senate Jud. Comm. Hearings, supra* note 27, at 9-10 (testimony of Robert B. Luce).

and the status of Vermont's post-amendment law relating to state regulation of private schools. Section two of this note will consider the constitutional issues involved in state regulation of nonpublic schools. Section three will examine the statutory inadequacies of the pre-amendment scheme of Vermont's Title 16, sections 166 and 1121, as highlighted by *State v. LaBarge*.³¹ Section four will examine the provisions of Act 151, the post-amendment scheme of Title 16. This final section will evaluate the effect the amendments will have on Vermont law and on the quality of education in Vermont.

II. FIRST AMENDMENT ANALYSIS

The first amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech"³² These rights, guaranteed by the Constitution, may not be abridged by a statute, except where compelling interests are involved³³ or where the statute's purpose is within the state's police powers.³⁴ The rights of the fundamentalists and the powers of government must be defined within this constitutional framework.

The Supreme Court holds that sectarian schools serve two functions: to offer secular education (the "temporal" function) and to provide religious indoctrination (the "religious" function).³⁵ The state has a legitimate interest in only the secular educational function.³⁶

The fundamentalists claim that four arguments against state regulation of their church-related private schools are supported by the first amendment.³⁷ They argue that they have the right, first,

31. 134 Vt. 276, 357 A.2d 121 (1976).

32. U.S. CONST. amend. I.

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

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

35. *Board of Educ. v. Allen*, 392 U.S. 236, 245 (1968); accord *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

36. No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

37. Telephone interview with Rev. Paul Weaver, President of Christian Schools of Vermont (September 12, 1981) [hereinafter cited as Weaver]. See Summary of Information

to be free from the establishment of a state religion or religious preference; second, to be free from the government's excessive entanglement with religion; third, to be free from the government's censorship of religious expression by prior restraint; and fourth, to exercise their religion freely without government intervention.³⁸ Each of these issues deserves separate analysis.

A. *The Establishment of Religion Clause*

Vermont's amended education statutes³⁹ require, as a prerequisite to state qualification, that nonpublic schools provide a program of studies for pupils that includes the basic skills of communication and citizenship.⁴⁰ The fundamentalists assert they should be exempt from any state regulation because their church-related schools are pervasively religious⁴¹ and there is no way to separate the religious from the educational function of the school.⁴²

The establishment clause of the first amendment,⁴³ made applicable to the states by the fourteenth amendment,⁴⁴ forbids Congress or a state legislature from making any law "respecting an establishment of religion."⁴⁵ The Supreme Court has construed this clause to mean that a state cannot found a church, pass laws to aid one religion, pass laws to aid all religions, or pass laws to prefer one religion over another, and that a state cannot force or influence a person to profess or renounce belief in any religion, nor punish a person for any such belief or nonbelief.⁴⁶

This broad interpretation of the establishment clause is derived from the Court's reasoning that the authors of the establish-

from Mr. Ball Pertaining to S. 170 for CSV Members Only (on file with the *Vermont Law Review*) [hereinafter Ball Summary].

38. Weaver, *supra* note 37.

39. VT. STAT. ANN. tit. 16, §§ 165, 165a, 166, 166a (Supp. 1992).

40. Reference in Title 16, sections 165(a), 165a(b)(2)(C), 166(a), and 166a(a), is made to "minimum course of study" which is defined in VT. STAT. ANN. tit. 16, § 906(b).

41. See *supra* notes 10-18 and accompanying text.

42. *Senate Jud. Comm. Hearing, supra* note 27, at 14 (testimony of Rev. Paul Weaver).

43. U.S. CONST. amend. I.

44. U.S. CONST. amend. XIV. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

45. U.S. CONST. amend. I.

46. *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that the compulsory in-school reading of a government-composed official prayer violated the establishment clause. The Court reasoned that the establishment clause not only prohibited direct government compulsion, but also "laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Id.* at 430.

ment clause did not simply prohibit the establishment of a state religion: "[i]nstead they commanded that there should be 'no law respecting an establishment of religion.'"⁴⁷ The Court thus has construed the intent of the clause not only to prohibit the establishment of a state church, but also to prohibit anything that could lead to such establishment.⁴⁸ From this construction of the establishment clause, fundamentalists assume that the state cannot constitutionally set standards for basic educational content in their church-related schools.⁴⁹ The establishment clause, however, is not without limits. It mandates that the state remain completely neutral with respect to religious beliefs,⁵⁰ but the state may regulate overt actions,⁵¹ even if these are for a religious purpose. Furthermore, when a statute is designed to protect a valid secular interest, and the statute incidentally affects a religious interest as well, there is no violation of the establishment clause.⁵²

For a statute to be valid under the establishment clause, the purpose and primary effect of the enactment must be secular.⁵³ Thus if a state enacts a statute requiring school districts to loan textbooks to parochial-school pupils, the statute will "withstand the strictures of the Establishment Clause"⁵⁴ because the purpose is secular and the primary effect does not advance or inhibit reli-

47. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis in original).

48. *Id.*

49. *See generally Senate Educ. Comm. Hearing, supra* note 5, at 5-17 (testimony of Rev. Paul Weaver).

50. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973). "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . ." *Id.* at 773; *see also Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 242-43 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 215 (1963); *Everson v. Board of Educ.*, 330 U.S. 15, 18 (1947).

51. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

52. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963); *see also Meek v. Pittenger*, 421 U.S. 349, 359 (1975); *Lemon v. Kurtzman*, 403 U.S. at 612-13.

53. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

School Dist. of Abington v. Schempp, 374 U.S. at 222 (citing *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)); *see also Vermont Educ. Bldgs. Financing Agency v. Mann*, 127 Vt. 262, 266, 270, 247 A.2d 68, 71, 73 (1968), *appeal dismissed*, 396 U.S. 801 (1969).

54. 374 U.S. at 222.

gion.⁵⁵ The Court's reasoning is that such an allocation of resources benefits the parents of parochial school pupils rather than the parochial schools themselves.⁵⁶

However, a statute prohibiting the teaching of evolutionary theory in publicly funded schools may run afoul of the establishment clause.⁵⁷ In *Epperson v. Arkansas*,⁵⁸ the Court struck down a state anti-evolution law. The Court determined that the only possible reason for enacting a statute, the purpose of which was to forbid the teaching of the theory of evolution in public schools, was to aid the fundamentalist religion to the exclusion of other religions or nonreligion. This reason, the Court found, violated the establishment clause: "The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion"⁵⁹ In its opinion, the Court recognized the state's power to regulate education and the operation of the school system.⁶⁰ Even facial neutrality could not save the statute because the law's narrow scope prohibited only the teaching of that theory of human development which is against the fundamentalist beliefs.⁶¹

Therefore, even if the fundamentalists could show that the state would not breach its duty by exempting their church-schools, it would be unconstitutional for the state to do so.

B. *Excessive Entanglement Rule*

The Court has recognized that the establishment clause contemplates a separation between church and state,⁶² but this separation is not required "in every and all respects."⁶³ For example,

55. *See id.*

56. *Id.*

57. *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972).

58. 393 U.S. 97 (1968).

59. *Id.* at 104. The Court held that a state law cannot "aid one religion, aid all religions, or prefer one religion over another." *Id.* at 106 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

60. *Id.* at 104.

61. *See id.*

62. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878).

63. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Expressly defining the manner in which there can be no interdependence between religion and government, the Court found that the establishment clause was designed to avoid antipathy between these two facets of society. Without this restrictive approach, the Court found that there would be many problems of overlapping that could not be resolved. The Court listed a number of these problems in example, such as: municipalities could not offer police or fire protection to religious groups,

some contact between government and religion is permissible. For example, fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws have been considered necessary and permissible contacts.⁶⁴ The issue is one of degree.⁶⁵

The fundamentalists, on the other hand, cite *Lemon v. Kurtzman* for the proposition that regulation of their church-schools would involve excessive entanglement by the state in religion as proscribed by the establishment clause.⁶⁶ In *Lemon*, the Court found excessive entanglement between government and religion⁶⁷ in two statutory schemes which provided state aid, through supplemental income or teacher's salary reimbursement to nonpublic elementary schools.⁶⁸ The Court's opinion hinged on its finding that a church-school is an "integral part of the religious mission of the . . . [c]hurch,"⁶⁹ therefore, any conduct by the state that involves itself too closely with the church-school will constitute an impermissible "entanglement." The Court enumerated several entangling instances of state conduct in its opinion, including: inspection and evaluation of church-schools' financial records,⁷⁰ comprehensive measure of surveillance and controls,⁷¹ intimate and continuing relationships between church and state,⁷² and state aid which by its nature may entangle the state in details of administration.⁷³ The *Lemon* Court found that "state inspection and evaluation of

Thanksgiving could not be proclaimed a holiday, churches could not be required to pay property taxes, and a public school teacher could not permit a pupil time off for a religious service or holiday. *Id.* at 312-13.

64. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

65. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

66. Ball Summary, *supra* note 37. The fundamentalists argue that if the Court has prohibited certain state evaluation and inspection activities of private sectarian schools to which the state is offering financial aid, the Court's characterization of impermissible state activities may include regulations regarding curricula and enrollment. Vermont's post-amendment curricular and enrollment standards require every private school, VT. STAT. ANN. tit. 16, §§ 165a, 166 (Supp. 1982), or home study program, *id.* § 166a, to provide to the Commissioner of Education the names and addresses of its pupils, its annual attendance records and the schools' curricula to qualify that school. *Id.* §§ 165a(e), 166(d), 166a(d).

67. 403 U.S. at 615. *Accord* *Americans United for the Separation of Church and State v. Oakey*, 339 F. Supp. 545 (D.C. Vt. 1972).

68. 403 U.S. at 606-07.

69. *Id.* at 616 (quoting district court's finding).

70. *Id.* at 620-22.

71. *Id.*

72. *Id.* at 622.

73. *Id.* at 615 (quoting Harlan, J., concurring in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

the religious content of a religious organization is fraught with the [excessive] entanglement that the Constitution forbids."⁷⁴ Therefore, a statute which is only directed toward assuring minimum academic requirements in the secular sphere is permissible by these standards. The Court supported this proposition, holding that a "[s]tate always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."⁷⁵

The Court has held that when government activities touch the religious sphere, they must be secular in purpose, even handed in operation, and neutral in primary impact.⁷⁶ The statutes under scrutiny in *Lemon* could pass none of these tests,⁷⁷ because the aid they offered accommodated less than twenty-five percent of the state's pupils, and of the students benefited, almost all were of the Roman Catholic faith.⁷⁸

On the other hand, Vermont's post-amendment statutory scheme under Act 151⁷⁹ includes two alternative statutory processes under which private schools may qualify to operate. One statute⁸⁰ merely requires a school to report certain information including minimum course of study compliance, but permits no active state evaluation of this information.⁸¹ The alternative statute

74. 403 U.S. at 620.

75. *Id.* at 613.

76. *Gillette v. United States*, 401 U.S. 437, 462 (1971); *accord* *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973).

77. 403 U.S. at 607.

78. *Id.* at 608, 610.

79. Act 151, (codified at VT. STAT. ANN. tit. 16, §§ 11, 164, 165, 165a, 166, 166a, 906, 1121, 1127 (Supp. 1982)).

80. *Id.* § 165a.

81. The state board of education or its designee requires each reporting private school to file a report detailing various qualifying criteria, including minimum course of study. Failure to comply with the minimum course of study subjects the school to certain specified sanctions. However, the only way the state evaluating process can be activated, and those sanctions applied, is if a complaint is filed, alleging that a private reporting school has failed to comply with the minimum course of study. Presumably, such a complaint would be made by a parent or a guardian of a pupil of that school.

It is questionable whether this, in reality, is an effective check on the curricular discretion of the school. A dissatisfied parent would be more likely to transfer his or her child to a different school rather than attempt to correct the perceived deficiencies in the dissatisfactory one. Furthermore, a parent might not select a private school based on whether the school provides a minimum course of study because such criteria, under Act 151, would be found in public schools anyway. It is conceivable that a parent might continue to send his or her child to a school which does not provide a minimum course of study if that parent feels the school is providing the child with some other type of experience not available in public school. In addition, a parent whose religious convictions forbid his children to learn even minimal educational requirements might choose a private school which fails to meet the

requires active state evaluation for a school to obtain state approval. There is opportunity for a hearing to determine whether the school provides a minimum course of study and substantially complies with the State Board of Education's rules for approved private schools.⁸² The act contemplates no state evaluation of any religious instruction or activity beyond this scope. The purpose and primary effect of the curriculum and enrollment requirement in both statutes is to ensure that all state residents of appropriate age are given an adequate secular education.⁸³ The statutory scheme applies even-handedly to both public and private schools⁸⁴ regardless of religious or nonreligious affiliation. The Vermont statutes thus fulfill the *Lemon* test, where the *Lemon* statutes could not.

The establishment clause is meant only to prohibit governmental involvement with people's beliefs, not their actions. In *Reynolds v. United States*,⁸⁵ the Court quoted Thomas Jefferson's view of the establishment clause as "building a wall of separation between Church and State."⁸⁶ The Court acknowledged Jefferson's

standards required under Act 151.

The court has determined that parents may not "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring, distinguishing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). "Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished." *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 817, 301 N.W.2d 571, 579 (1981).

82. VT. STAT. ANN. tit. 16, § 166(a) (Supp. 1982). The amended statutory scheme also permits the State Department of Education to propound regulations for home study programs and for approved private schools, but not for reporting private schools. *Id.* § 164(14). See also Vermont Dep't Educ., Proposed Regulations for Private Schools, §§ 2222-2226.9 (1982) (on file with Vermont Dep't Educ.).

83. Telephone interview with Robert B. Luce, Legal Counsel for Vermont Dep't Educ. (October 18, 1982).

84. VT. STAT. ANN. tit. 16, §§ 165, 165a, 166 (Supp. 1982).

In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the Court held that a state could exempt nonprofit church property from taxation because the state did not single out "one particular church" but granted the exemption to "all houses of worship within a broad class of property owned by non-profit quasi-public corporations which include hospitals, libraries, playgrounds . . . and patriotic groups." *Id.* at 672-73.

85. 98 U.S. 145, 164 (1878).

86. *Id.* The Court quoted from Mr. Jefferson's reply to a Danbury Baptist Ass'n Comm. address:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole

statement as "an authoritative declaration of the scope and effect of the [first] amendment,"⁸⁷ and went on to construe Jefferson's words to mean that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."⁸⁸ The Court went on to say that, while laws "cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"⁸⁹

Thus, the Court recognizes the state power to regulate church-school practices, though not beliefs, in matters which have a secular purpose and primary effect. In *Norwood v. Harrison*,⁹⁰ the Court made it clear that the state may assist sectarian schools in performing their secular functions because the state has a substantial interest in the quality of education being provided by nonpublic schools. Furthermore, the Court found that if assistance is properly confined to secular functions, the state is not promoting the religious mission of the schools and is not interfering with the free exercise rights of others.⁹¹

In another case, the Court found the establishment clause was intended to afford protection against three types of entanglement: "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁹²

Vermont's amended statutes, regulating only certain actions of the private education sector regarding secular education, involve none of these establishment clause problems. The statutes in *Lemon*, however, managed to reach all of these types of entangle-

American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Id.

87. *Id.* at 164.

88. *Id.*

89. *Id.* at 166.

90. 413 U.S. 455 (1973).

91. *Id.* at 468.

92. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

ment. In *Lemon*, the Court was concerned with the societal effects such statutes would create. First, the Court expressed concern over the "self-perpetuating and self-expanding propensities"⁹³ of government financial aid programs and the necessity of constitutional adjudication to stem these programs' momentum. In his concurring opinion, Justice Douglas, joined by Justice Black and Justice Marshall, characterized the expansive potential of government financial aid programs in *Lemon* as contemplating "surveillance [by] a public investigator [in] every classroom."⁹⁴ The amount of aid offered and thus the annual appropriations required by both the statutory programs under scrutiny in *Lemon* depended solely on need and so were found likely to escalate in proportion to population growth.⁹⁵ As to one statute, the Court cited the district court's finding that sectarian school system's "'monumental and deepening financial crises' would inescapably require larger annual appropriations"⁹⁶

Second, the Court was concerned about the divisive political potential of these state programs.⁹⁷ The desire to have or to avoid state assistance would become a political issue, and voters would begin to choose candidates based on their religious objectives. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect."⁹⁸ The Court noted that "[t]he history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."⁹⁹

93. 403 U.S. at 624.

94. *Id.* at 627. (Douglas, J., concurring).

There is in my view . . . an entanglement here. The surveillance or supervision of the States needed to police grants involved in these . . . cases, if performed, puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that surveillance or supervision does not occur the zeal of religious proselytizers promises to . . . make a shambles of the Establishment Clause. Moreover, when taxpayers of many faiths are required to contribute money for the propagation of one faith, the Free Exercise Clause is infringed.

Id. at 627-28.

95. *Id.* at 623. As to the other statute, the likelihood of state aid escalation was realized when an expansion of the state's tax base was required to cover the increasing costs of state aid. *Id.* at 624.

96. *Id.* at 623.

97. *Id.* at 622.

98. *Id.*

99. *Id.* at 623.

These concerns may well explain the *Lemon* decision. They may also distinguish it from the issue presented by the fundamentalists' attack on the state's ability to inspect private schools for the purpose of enforcing minimal curricular requirements.¹⁰⁰ That this is an infringement of the fundamentalist's rights is highly questionable and at least one member of the Vermont Legislature has expressly announced his doubts as to the merit of the fundamentalist position.¹⁰¹

C. *The Free Exercise Clause*

The fundamentalists also attack state regulation of their church-schools as an infringement on their right to exercise their religion freely. The free exercise clause of the first amendment of the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."¹⁰² Fundamentalists contend that because the education offered by their church-schools is pervasively religious in character¹⁰³ and because education has always been the basic ministry of the church,¹⁰⁴ state regulation of educational content violates their right to exercise their religion freely. In support of this contention, the fundamentalists cite *Wisconsin v. Yoder*,¹⁰⁵ a case which established a balancing test¹⁰⁶ between the free exercise clause and state regulation.

The *Yoder* case involved members of the Old Amish religion, who successfully challenged Wisconsin's compulsory attendance law. The Amish argued that compulsory attendance in school past the eighth grade resulted in an absorption of their children into society outside the Amish community.¹⁰⁷ The fundamentalists assert that *Yoder* demonstrates that the state's interest in compulsory education, although a strong one, can be outweighed by a le-

100. Reverend Paul Weaver, President of the Christian Schools of Vermont, stated that the fundamentalists could not accept on-site inspection. Each of their churches and schools are autonomous and independent in their structure. Therefore, forcing one clergyman to submit to the inspection of his school by another clergyman or the state would be against the fundamentalists' beliefs. *Senate Educ. Comm. Hearing, supra* note 5, at 5-17 (testimony of Rev. Paul Weaver).

101. *Id.* at 15-16 (statement of Sen. Gibson).

102. U.S. CONST. amend. I.

103. See *supra* note 27; see, e.g., *Senate Educ. Comm. Hearing, supra* note 5, at 17 (testimony of Rev. Paul Weaver).

104. *Senate Educ. Comm. Hearing, supra* note 5, at 4 (testimony of Rev. Paul Weaver).

105. 406 U.S. 205 (1972).

106. *Id.* at 213-15.

107. *Id.* at 218.

gitimate free exercise challenge.¹⁰⁸

[A] State's interest in universal education, however highly [ranked], is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children¹⁰⁹

The Court's balancing test weighs heavily in favor of free exercise: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹¹⁰ Carrying this reasoning one step further, the fundamentalists cite *Yoder* for the contention that the state can present no interest "of sufficient magnitude"¹¹¹ to outweigh their free-exercise right.

In *Yoder*, the Court balanced the parties' interest in favor of the Amish. However, *Yoder* was intended to be distinguished from the issue presented by the fundamentalists. In *Yoder*, the Court carefully constructed its opinion to limit any expansion beyond the facts.¹¹² In balancing the interests, the Court considered not only the strong compelling religious interest of the Amish, but also the three hundred year old history of Amish self-sufficiency,¹¹³ which negated the state's concern that high school "drop-outs" would become a burden on the state. Furthermore, the Court recognized the state's power of reasonable regulation over the agricultural voca-

108. *Id.* at 215.

109. *Id.* at 214.

110. *Id.* at 215; see *Sherbert v. Verner*, 374 U.S. 398 (1963). "The burden on the free exercise of [one's] religion must be justified by a compelling state interest." *Id.* at 403.

111. *Wisconsin v. Yoder*, 406 U.S. at 214.

112. "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235 (emphasis added). In *State ex rel. Douglas v. Faith Baptist Church of Louisville*, the Supreme Court of Nebraska found that the *Yoder* decision was "greatly, if not completely, influenced by the [fact that the state's interest was at most] 2 years of education . . . for students not expected to enter the mainstream of modern-day life [which was balanced] against competing religious principles and practices nearly 3 centuries old." 207 Neb. 802, 813, 301 N.W.2d 571, 578 (1981). For this proposition, the Nebraska court interpreted *Yoder*: "[C]ompulsory education for a year or two beyond the eighth grade may be necessary . . . in modern society as the majority live, but is quite another [when its] goal [is] preparation of the child for life in the separated agrarian community . . . of the Amish . . ." *Id.* at 813, 301 N.W.2d at 577-78 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972)).

113. 406 U.S. at 222, 235.

tional program in the Amish communities.¹¹⁴ Therefore, the decision did not prohibit state regulation when religious interests are involved, but held only that the religious interest of the Amish outweighed the compulsory-attendance requirement of the state.

Interpreting *Yoder* in this way, a recent Nebraska Supreme Court decision¹¹⁵ upheld as constitutional the state regulatory scheme which provided not only required courses of study, but mandatory certification of all teachers and periodic state inspections in all private schools. Citing the state's "critical interest . . . in the quality of education provided [to] its youth,"¹¹⁶ the court ruled against a fundamentalist Christian church which operated a 22-pupil school. In its decision, the court reasoned that "[a]lthough parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished."¹¹⁷ Similar statutory requirements have also been upheld by the Supreme Court of North Dakota.¹¹⁸

The fundamentalists also cite the Ohio cases,¹¹⁹ *State v. Whisner*¹²⁰ and *State ex rel. Nagle v. Olin*,¹²¹ in which the Supreme Court of Ohio held that the Ohio Board of Education's standards relating to the operation of private schools impinged on the right to free exercise of religion.¹²² In *Whisner*, the court cited *Yoder* in holding that the board's "minimum standards" "unduly burden[ed] the free exercise of religion."¹²³

The fundamentalists assert that the Ohio cases stand for the proposition that state regulation of minimum standards violates their free-exercise right.¹²⁴ The Ohio statute regulating "minimum standards," however, is distinguishable from Vermont's amended

114. *Id.* at 236.

115. *State ex rel. Douglas v. Faith Baptist Church of Louisville*, 207 Neb. 802, 301 N.W.2d 571 (1981).

116. *Id.* at 817, 301 N.W.2d at 579.

117. *Id.*

118. *State v. Shaver*, 294 N.W.2d 883, 892-93, 900 (N.D. 1980).

119. *Senate Educ. Comm. Hearing, supra* note 5, at 9 (testimony of Rev. Paul Weaver).

120. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

121. 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980).

122. *Id.* at 352, 415 N.E.2d at 286-87; 47 Ohio St. 2d at 204, 351 N.E.2d at 764.

123. 47 Ohio St. 2d at 204, 351 N.E.2d at 764 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)).

124. See *Senate Educ. Comm. Hearing, supra* note 5, at 20 (testimony of Rev. Paul Weaver); *Senate Jud. Comm. Hearing, supra* note 27, at 14 (testimony of Rev. Paul Weaver).

standards under the Private School Approval Act,¹²⁵ the Reporting Private School Act,¹²⁶ and the Home Study Program Approval Act.¹²⁷

In Ohio, the standards set out in *Whisner*¹²⁸ require that "[b]ased on a minimum five-hour school day or one of greater length, the *total* instructional time allocation per week shall be: four-fifths—language arts, mathematics, social studies, science, health, citizenship, related directed study and self-help; . . . [and] one-fifth—directed physical education, music, art, special activities and optional applied arts."¹²⁹ Because these standards did not allot time for Biblical or spiritual training,¹³⁰ and allocated instructional time in the required comprehensive curriculum "almost to the minute,"¹³¹ the court held that the standards "overstepp[ed] the boundary of reasonable regulation as applied to a non-public religious school."¹³² *Whisner* held that the board's "minimum standards" unduly burdened free exercise of religion because their scope and effect were so all-encompassing that compliance would have prevented religious instruction in the statutorily allotted time.¹³³

That the *Whisner* rationale was limited to an all-encompassing statute was enforced in *State ex rel. Nagle v. Olin*.¹³⁴ The Supreme Court of Ohio repeated its concern that the state's regulations were unreasonable¹³⁵ and that new standards should be adopted.¹³⁶ In its decision, the court used the *Yoder* tripartite analysis¹³⁷ and determined that the appellant's free-exercise claim outweighed the state's regulations: first, because the appellant's religious beliefs were "truly held;" second, because the appellant

125. VT. STAT. ANN. tit. 16, § 166 (Supp. 1982).

126. *Id.* § 165a.

127. *Id.* § 166a.

128. 47 Ohio St. 2d at 201-03, 351 N.E.2d at 762-63.

129. *Id.* at 201, 351 N.E.2d at 762 (emphasis added) (quoting OHIO REV. STAT. ANN. EDb-401-02(G)).

130. *Id.* at 201, 351 N.E.2d at 762-64.

131. *Id.* at 206, 351 N.E.2d at 765.

132. *Id.* at 204, 351 N.E.2d at 764 (emphasis omitted).

133. "In our view, these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education . . ." *Id.* at 211-12, 351 N.E.2d at 768.

134. 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980).

135. *See id.* at 353, 415 N.E.2d at 287.

136. *Id.* at 353, 415 N.E.2d at 288.

137. *Id.* at 350, 415 N.E.2d at 285-86.

demonstrated how the state regulations infringed on his right to free exercise of religion; and third, because the state was unable to demonstrate that its interest in implementing its regulations could not be served in any other less restrictive way.¹³⁸ The court, however, indicated that less restrictive standards could be adopted which would "assure achievement by students in a wide range of subject areas,"¹³⁹ and that such a change might alter the balance in favor of the state.

To guide the board of education in its formulation of appropriate standards, *Nagle* cited the Supreme Court's decision in *Board of Education of Central School District v. Allen*.¹⁴⁰ *Nagle* specifically directed the board of education's attention to that part of *Allen* which states: "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction"¹⁴¹

The Supreme Court in *Allen* noted that it had suggested in several decisions that such state regulations are constitutionally permissible.¹⁴² Vermont's amended curricular standards¹⁴³ do not overstep the constitutionally permissible guidelines set up by the Court in *Allen* and are permissible under the state's police powers, to protect the safety, health, and welfare of its citizens.

Vermont's amended statutory scheme has none of the Ohio statute's infirmities. The Private School Approval Act only requires substantial compliance with the board's rules¹⁴⁴ and mini-

138. *Id.*

139. *Id.* at 354, 415 N.E.2d at 288.

140. 392 U.S. 236 (1968), cited in *Nagle*, 64 Ohio St. 2d at 354, 415 N.E.2d at 288.

141. 64 Ohio St. 2d 341 at 354, 415 N.E.2d at 288 (quoting *Allen*, 392 U.S. at 245-46).

142. 392 U.S. at 245-46. The Court noted that in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)), it had held that "the State 'may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty'" *Board of Educ. v. Allen*, 392 U.S. 236, 246 n.7 (1968). The *Allen* Court also cited various state decisions which upheld "a wide range of private school regulations." 392 U.S. at 246 n.7. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court also held that children could be sent to a "religious rather than a public school if the school meets the secular educational requirements which the state has power to impose." *Id.* at 18.

143. VT. STAT. ANN. tit. 16, § 906 (Supp. 1982).

144. VT. STAT. ANN. tit. 16, § 166(a) (Supp. 1982).

imum course of study.¹⁴⁵ The Reporting Private School Act requires even less. In addition to minimum course of study,¹⁴⁶ the reporting school needs only to report its objectives, pupil attendance and progress records to the state. The school must also state that it can and will provide the "minimum course of study,"¹⁴⁷ as defined by statute.¹⁴⁸ The statutes neither require time allotment nor preclude religious instruction. Therefore, the Ohio decisions should not be used to bolster argument against Vermont's regulation of curricular standards in private schools.

D. Prior Restraint

Prior restraint is a technique for prohibiting dissemination of material which is protected by the first amendment.¹⁴⁹ The freedom from prior restraint, or censorship, is a first amendment privilege which has been held to protect the following activities: the freedom to distribute literature without a license,¹⁵⁰ freedom from injunctions against publication¹⁵¹ or distribution¹⁵² of literature, or freedom from excessive discretionary administrative powers in authorizing permits for expressive activities. The prevention of prior restraint was one of the primary purposes in the adoption of the first amendment.¹⁵³ Because prior restraint is particularly offensive to the first amendment due to its potential for disrupting the freedoms guaranteed therein,¹⁵⁴ the Court has held that any system of prior restraint bears a heavy presumption against its constitutional validity.¹⁵⁵

The government's use of prior restraint has generally been to prohibit speech, but occasionally it has been used to enjoin religious practices. When ordinances result in censorship of religious practices before permitting the exercise of such practices, the Court has held that the first amendment forbids their enforce-

145. *Id.*

146. *Id.* § 165a(b)(1)(C), (D).

147. *Id.* § 165a(a)(2)(A).

148. *Id.* § 906.

149. *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697, 717-20 (1931); *State v. I, A Woman*, 53 Wis. 2d 102, 112-13, 191 N.W.2d 897, 902-03 (1971).

150. *Lovell v. City of Griffin*, 303 U.S. 444, 448-51 (1938).

151. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 439-44 (1957).

152. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971).

153. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938).

154. *Near v. Minnesota*, 283 U.S. 697, 721-23 (1931).

155. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

ment.¹⁵⁶ In *Cantwell v. Connecticut*,¹⁵⁷ the Court reversed convictions of Jehovah's Witnesses for soliciting religious contributions without a state certificate and for committing a breach of the peace by going door to door and playing a religious record. The Court held that the state could not condition religious expression on a license because the determination of what is a religious cause lays a "forbidden burden upon the exercise of liberty protected by the Constitution."¹⁵⁸

The fundamentalists make the following argument against the Private School Approval Act: First, religious education is an integral part of the church ministry.¹⁵⁹ Second, the Private School Approval Act requires registration of their schools with the state or a state agent for approval. Therefore, the state is actually requiring approval of the church itself before it may exercise its "religious witness in education."¹⁶⁰ Such a requirement would be an infringement of the fundamentalists' right to free exercise of their religion—a right which can only be denied upon a showing of a compelling state interest.¹⁶¹ Since no such interest can be shown, the fundamentalists claim, the requirement that a church may not teach without first registering with the state constitutes prior restraint and thus is a "fundamental violation of religious liberty."¹⁶² This argument might also be expanded to apply to the Reporting Private School Act, because that statute requires the reporting private school to file a report with the state as a precondition to doing business in the state.¹⁶³ However, the fundamentalists have accepted the Reporting Private School Act as an acceptable compromise.¹⁶⁴

156. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); see also *Kovacs v. Cooper*, 336 U.S. 77 (1949).

157. 310 U.S. 296 (1940).

158. *Id.* at 307; see also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), where the Court held a state's licensing fee program to be too great a burden on those who wished to "[spread] religious beliefs in [an] ancient and honorable manner." *Id.* at 112. The Court reasoned that the state's legitimate needs for regulation could be met without imposing such potentially crushing burdens on religious activities. *Id.* at 112, 115.

159. Ball Summary, *supra* note 37 at § II(B)(A); see *Senate Educ. Comm. Hearing*, *supra* note 5, at 4 (testimony of Rev. Paul Weaver).

160. Ball Summary, *supra* note 37, at § IC.

161. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963).

162. Ball Summary, *supra* note 37, at § C(2).

163. VT. STAT. ANN. tit. 16, § 166a(e) (Supp. 1982).

164. *House Educ. Comm. Hearing*, *supra* note 27, at 4 (testimony of Rev. Paul Weaver).

In the Court's characterization of sectarian schools, however, it has never identified the school and the church as one unit. The Court has held that parochial schools constitute "an integral part of the religious mission of the . . . Church,"¹⁶⁵ that "parochial schools involve substantial religious activity and purpose,"¹⁶⁶ and that "[r]eligious authority . . . pervades the school system,"¹⁶⁷ but the Court has consistently rejected the idea that the secular and religious functions of a sectarian school are inseparable.¹⁶⁸ Therefore, the argument in favor of state regulation of private sectarian schools would be that a registration, used to enforce only the state's basic secular education requirements, does not affect the church itself, and thus does not constitute an infringement of a first amendment freedom.

The fundamentalists, however, argue that the application of even a facially neutral regulation such as enforcement of basic secular educational requirements, might restrain the exercise of their religion. Therefore, being completely "religion-blind" cannot be the only criterion the first amendment requires of a state's statutory scheme to prevail over a challenge of prior restraint.¹⁶⁹ In *Wisconsin v. Yoder*,¹⁷⁰ for example, the challenged state law compelled school attendance for all children residing in the state until they reached age sixteen, without regard to religious affiliation.¹⁷¹ The statute was completely neutral on its face as to religion, but the Court found that when this law was applied to Amish children, whose beliefs involved a simple agrarian life removed from "worldly influence," any formal education beyond the eighth grade jeopardized those children's first amendment freedoms.¹⁷² The Court therefore held that the Wisconsin compulsory-attendance law could not be enforced beyond the eighth grade as to Amish children.¹⁷³

If religious group members claim that a regulation which is

165. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

166. *Id.*

167. *Id.* at 617.

168. *Id.* at 613; *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 532, 534 (1925).

169. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

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

171. *Id.* at 207.

172. *Id.* at 218-21.

173. *Id.* at 234-35. Although the Court determined this case on the basis of the free exercise clause, an argument for prior restraint could have been made.

neutral on its face in fact favors one religion over another, however, those claimants have the burden of demonstrating that such a statute would operate against it in the practice of their religion.¹⁷⁴ That is, there must be evidence that the claims are "rooted in religious belief"¹⁷⁵ to activate constitutional protection.

In summary, the fundamentalists would have little chance of succeeding with a free exercise infringement claim against Vermont's amended Private School Approval Act. The holdings they cite to bolster their claim are very narrowly drawn and distinguishable,¹⁷⁶ and are likely to be without merit.¹⁷⁷ As to the establishment issue, since the Court has found that religious and secular functions of a private religious school are separable,¹⁷⁸ state regulation of the secular functions is not an excessive entanglement with religion. If there are not free-exercise infringements or establishment problems, there is no first amendment violation. If there is no first amendment violation, the state has not censored a constitutionally protected interest under the first amendment. If there is no censorship, there is no prior restraint. It is not necessary, then, for the state to show a compelling state interest in order to tip the balance in favor of its interest in the education of its citizens over the claimants' first amendment rights.

The only issue remaining is whether the state has a constitutionally protected interest in regulating the education of its citizens. To this issue, the Court has held that "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."¹⁷⁹ The powers not constitutionally delegated to the federal government are reserved to the states.¹⁸⁰ The United States Supreme Court has recognized that the assurance of quality education for its citizens is a state function.¹⁸¹ Under its police power, the state has a recog-

174. *Id.* at 235-36. *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968) (citing *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963)).

175. 406 U.S. at 215.

176. *See supra* notes 104-18 and accompanying text.

177. *See, e.g., Senate Educ. Comm. Hearing, supra* note 5, at 15-16 (testimony of Sen. Gibson).

178. *See supra* text accompanying notes 41-52.

179. *Board of Educ. v. Allen*, 392 U.S. 236, 247 (1968).

180. U.S. CONST. amend. X.

181. "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded . . ." *Allen*, 392 U.S. at

nized and conceded interest in sufficiently educating its children to enable them to become functional and intelligent members of society.¹⁸² The state, therefore, has a proper interest in the manner in which the schools perform their educational functions,¹⁸³ as long as this interest in education is so compelling that it outweighs the highly protected and legitimate first amendment claims.¹⁸⁴

III. PRE-AMENDMENT ANALYSIS

Almost every state regulatory scheme provides for minimum educational standards to which private schools must adhere.¹⁸⁵ Generally, these standards are enforced through state compulsory-attendance laws.¹⁸⁶ Some states authorize punitive actions against the parents of the child.¹⁸⁷ Although compulsory-attendance re-

247.

The Court and the legislatures have recognized that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an *indispensable* ingredient for achieving the kind of nation and the kind of citizenry, that they have desired to create

[W]e cannot agree . . . that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined [that secular textbooks become instruments of religious training] . . .

Id. at 247-48 (1968) (emphasis added). See also *Wisconsin v. Yoder*, 406 U.S. 212, 213 (1971) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)).

182. *Board of Educ. v. Allen*, 392 U.S. 236, 247-48 (1968); *State v. Garber*, 197 Kan. 567, 572, 419 P.2d 896, 900-01 (1966); *State v. Williams*, 253 N.C. 337, 341, 117 S.E.2d 444, 448 (1960); *Santa Fe Community School v. New Mexico State Bd. of Educ.*, 85 N.M. 783, 784, 518 P.2d 272, 273 (1974); *State ex rel. Nagle v. Olin*, 64 Ohio St. 2d 341, 352, 415 N.E.2d 279, 287 (1980).

183. See, e.g., *Sheehan v. Scott*, 520 F.2d 825, 828 (7th Cir. 1975) (the court held that the state power to compel school attendance is unquestioned); *State ex rel. Douglas v. Faith Baptist Church of Louisville*, 207 Neb. 802, 811, 301 N.W.2d 571, 577 (1981); *Meyerkorth v. State*, 173 Neb. 889, 899, 115 N.W.2d 585, 591 (1962); *State v. Shaver*, 294 N.W.2d 883, 897 (N.D. 1980); see also *State v. Garber*, 197 Kan. 567, 572-73, 419 P.2d 896, 900-01 (1966) (the court held that the state may require that all children of proper age attend some school, and the natural rights of a parent are subordinate to the police power of the state and may be restricted by municipal law providing minimum educational standards).

184. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). See *supra* text accompanying notes 109-10.

185. See *Nebraska Survey*, *supra* note 7. This survey tabulates responses by each of the fifty state departments of education concerning their private school regulation.

186. *Id.*

187. See P.M. Lines, *Private Education Alternatives and State Regulation 3* (August, 1981) (Ms. Lines, Director of Law and Education Center, Educ. Comm'n of the States, analyzes the degree of regulation imposed by the different state statutory schemes on compulsory attendance) (on file with the Educ. Comm'n of the States).

quirements vary from state to state in scope and effect,¹⁸⁸ the law in almost every state provides for fines and jail sentences for parents who fail to comply, as well as for truancy charges and possible state custody of the child.¹⁸⁹

States disagree, however, on the *degree* to which state law may regulate private schools to meet the required minimum standards: some states require state approval by state certification of teachers and schools,¹⁹⁰ others require state approval by compliance with certain course requirements;¹⁹¹ and some require merely minimal evidence that private schools are operating.¹⁹² At least one state has gone so far as to exempt altogether private religious schools from state curricular regulation.¹⁹³

Prior to 1976, regulation of private schools in Vermont was accomplished by enforcing Title 16, section 166 of Vermont Statutes Annotated¹⁹⁴ with the sanctions of Title 16, section 1121 of Vermont Statutes Annotated.¹⁹⁵ Section 166, the Private School Approval Act, set forth the approval requirements for private schools but lacked sanctions. Section 1121, the Compulsory Attendance Act, provided an enforcement mechanism.¹⁹⁶ The enforcement mechanism was activated if a child was not receiving a public or an "equivalent" education. The Vermont Department of Education, in an effort to enforce the approval requirements of section 166, construed "equivalent education" to mean education in an approved school.¹⁹⁷ When a child attended an unapproved school, then, the department found that child was not receiving an equivalent education and therefore was truant. The state encouraged the registration of private schools by prosecuting the par-

188. *Id.*

189. *Id.*

190. *See, e.g.*, N.D. CENT. CODE §§ 15-34.1-03(1), 15-41-25 (1981).

191. *See, e.g.*, ARK. STAT. ANN. § 80-4302 (Supp. 1980); CONN. GEN. STAT. ANN. §§ 10-188 (West 1977).

192. *See* GA. CODE ANN. §§ 32-2104, 32-2114 (1980); MD. EDUC. CODE ANN. § 2-205 (o) (1978 & Supp. 1981); *id.* § 2-304 (1978).

193. N.C. GEN. STAT. §§ 115C-547-115C-554 (1982); *see also* Note, *The State and the Sectarian Education: Regulation and Deregulation*, 1980 DUKE L.J. 801, 833-34 (1980) [hereinafter cited as *Sectarian Education*].

194. VT. STAT. ANN. tit. 16, § 166 (1974).

195. *Id.* § 1121.

196. *Id.* §§ 1121, 1127.

197. *See* Note, *Private Schools in Vermont: The "Equivalency Exception" to Compulsory Public School Attendance—State v. LaBarge*, 2 VT. L. REV. 205, 205-06 n.7 (1977) [hereinafter cited as *The Equivalency Exception*].

ents of children attending an unregistered, unapproved private school for failing to furnish such children with "equivalent education."¹⁹⁸

In 1976, the Vermont Supreme Court exposed the fundamental weakness in this statutory scheme. In *State v. LaBarge*,¹⁹⁹ the court barred the department from using the terms "approved" and "equivalent" interchangeably by finding that the Compulsory Attendance Act and the Private School Approval Act were not intended to be synonymous.²⁰⁰ In *LaBarge*, the state had attempted to prosecute parents for truancy when their school-age children were sent to an unapproved school; this was an attempt to enforce the state's private school approval requirements. The court recited the facts in *LaBarge* as follows: "[T]he school at which [the children] were being educated was a private school, apparently of religious affiliation and admittedly not approved under 16 V.S.A. § 166. The school had applied for such approval but was found deficient [It was] invited to reapply when [the deficiencies] were remedied."²⁰¹ The school did not reapply for approval status and on this basis the state prosecuted the parents of its pupils for truancy. The *LaBarge* court dismissed the charges against the parents because the prosecution was "based entirely on the status of the school . . . being unapproved"²⁰² The court reasoned that the truancy statute could not be taken to require attendance exclusively at approved schools because "a parent's right to provide an 'equivalent education' to his child at home" is constitutionally recognized.²⁰³ In addition, the court noted there is a "special statutory duty given the state department of education to make such an equivalency determination under 16 V.S.A. § 1121(b)."²⁰⁴

198. *Id.*

199. *State v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976).

200. The *LaBarge* court reasoned:

[T]he Legislature . . . intended to distinguish ["equivalent education" in Vr. STAT. ANN. tit. 16, § 1121(a) (1974)] from the concept of school "approval" [because, although] an "approved" school may always meet] the standard of equivalency . . . "approval" may be denied on a ground unrelated to . . . "equivalency" It is for that reason that there is the special statutory duty given the state department of education to make such an equivalency determination under 16 V.S.A. § 1121(b).

134 Vt. 276, 280-81, 357 A.2d 121, 124-25 (1976); see also *The Equivalency Exception*, *supra* note 197, at 206.

201. 134 Vt. at 277, 357 A.2d at 123.

202. *Id.* at 281, 357 A.2d at 125.

203. *Id.* at 280, 357 A.2d at 124.

204. *Id.* at 280-81, 357 A.2d at 125.

Until amended in 1981, however, Vermont's Compulsory Attendance Act²⁰⁵ did not specify any standards under which the state could fulfill this equivalency duty. Moreover, the Private School Approval Act²⁰⁶ prior to 1981 lacked sanctions to enforce private-school compliance. In *LaBarge*, the state was unable to enforce its private school registration requirement for three major reasons. The court found: (1) the burden to establish truancy rested on the state;²⁰⁷ (2) there was no penalty imposed under the Private School Approval Act against schools which chose not to apply for state approval;²⁰⁸ and (3) there was no other state requirement for registration of private schools within the statutory scheme.²⁰⁹

Without enforced registration, the state could not locate or ascertain the existence of unregistered private schools unless they voluntarily complied. Since the state had no means to locate unregistered private schools, it could not enforce any enrollment record requirement. Without private school enrollment data, the state could not distinguish between attendance at an unregistered private school and truancy from a public or registered private school. Therefore, the state could not enforce its compulsory-attendance statute for the benefit of any of its citizens or for its students, whether in an approved educational program in the home, the public sector, or the private sector.

At the same time, the state could not ascertain the quality of education provided in private schools because of its ineffective registration provision. The result of these deficiencies in the statutory scheme was that the state was unable to require even a threshold level of education in private schools. This flaw handcuffed the state's effectiveness in providing the benefits of an adequate education—a recognized and conceded interest which falls within the state's powers.²¹⁰ Because the *LaBarge* decision precluded the state

205. VT. STAT. ANN. tit. 16, § 1121 (1974).

206. *Id.* § 166.

207. 134 Vt. at 277, 357 A.2d at 123 (1976); see *Senate Jud. Comm. Hearing, supra* note 27, at 5 (testimony of Robert B. Luce).

208. See VT. STAT. ANN. tit. 16, § 166 (1974); *LaBarge*, 134 Vt. at 280, 357 A.2d at 124-25.

209. See VT. STAT. ANN. tit. 16 (1974).

210. *Board of Educ. v. Allen*, 392 U.S. 236, 245 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *State v. Garber*, 197 Kan. 567, 572, 419 P.2d 896, 900 (1966); *State v. Williams*, 253 N.C. 337, 341, 117 S.E.2d 444, 448 (1960) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); *Santa Fe Community School v. New Mexico State Bd. of Educ.*, 85

from exercising this function under its then current statutory scheme, to this extent *LaBarge* represented an invitation to the legislature to correct the statutory deficiencies.²¹¹

The primary reason for the court's holding in *LaBarge* was a finding that "approval," under the Private School Approval Act, was a much more comprehensive standard than "equivalency," which, under the Compulsory Attendance Act, was only a measurement of curriculum adequacy. In finding these two standards to be distinct, the court also disapproved of the unnecessarily broad requirements of the Private School Approval Act, which allowed the State Board of Education to evaluate schools by such criteria as: "financial capacity, faculty, curriculum, physical facilities, and special services."²¹² The questionable constitutionality of limiting compulsory school attendance to approved institutions was raised by the *LaBarge* court in these terms:

In the light of what is involved in "approval," the state would be hard put to constitutionally justify limiting the right of normal, unhandicapped youngsters to attendance at "approved" institutions.

. . . .
Reading "approval" for "equivalent education" would subject parents to truancy complaints if the school, for example, failed to acquire sufficient library resources or even library tables and chairs to keep up with the enrollment, or if, for some reason, its financial stability suddenly looked risky to the board. This is hardly justification to convert innocent acts for the benefit of children into crimes on the part of the parents.²¹³

A representative of the Vermont Department of Education said of section 166:

[I]f there were [an enforcement provision in section 166] I would question whether the statute would be upheld [as constitutional] because it involves a detailed analysis of the school's finances, administrative structure, et cetera. I don't believe the state has sufficient compelling justification for making those . . . requirements.²¹⁴

N.M. 783, 784, 518 P.2d 272, 273 (1974); *State ex. rel. Nagle v. Olin*, 64 Ohio St. 2d 341, 352, 415 N.E.2d 279, 287 (1980).

211. *The Equivalency Exception*, *supra* note 197, at 216.

212. VT. STAT. ANN. tit. 16, § 166 (1974).

213. 134 Vt. at 280, 357 A.2d at 124-25.

214. *Senate Jud. Comm. Hearing*, *supra* note 27, at 11 (testimony of Robert B. Luce).

The Private School Approval Act had other deficiencies as well. It offered no specific standard to guide the state in evaluating each of the criteria set forth in the statute except as to whether "the school has the resources required to meet its stated objectives."²¹⁵ An otherwise constitutional authorizing statute may be unconstitutional for delegating too much discretion to an administrative agency, an "unwarranted delegation of legislative power."²¹⁶ The delegation doctrine, formulated by the United States Supreme Court, has led to the invalidation of such legislation in the past,²¹⁷ and continues to have a strong impact on state court decisions.²¹⁸ At the same time, the lack of specific quantifiable standards in Vermont's Private School Approval Act may well have made the statute void for vagueness.²¹⁹

The *LaBarge* court implied that the statute could have fallen under constitutional attack were there no other way to curb the potentially vague scope of state regulation authorized under the Private School Approval Act.²²⁰ The court, however, did not find it necessary to strike down the Vermont statute on constitutional grounds because finding "equivalence" and "approval" non-interchangeable²²¹ restricted the state's ability to use the statute's offending language.²²² This constitutional issue became moot after *LaBarge*, because after that decision, the state could no longer regulate unregistered private schools by truancy prosecution and the statutes provided no other effective sanction against non-registration. After *LaBarge*, the state could no longer enforce any regulation, regardless of its constitutionality, on an unregistered private school. To avoid state regulation under the Private School Approval Act, a private school needed only to refuse to register for

215. VT. STAT. ANN. tit. 16, § 166 (1974).

216. *State v. Williams*, 253 N.C. 337, 347, 117 S.E.2d 444, 451 (1960).

217. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

218. Although Supreme Court decisions since *Schechter* have avoided the delegation doctrine to strike down certain federal administrative regulations, *Schechter* and *Panama* have never been overruled and stand for the proposition that Congress cannot "vote itself out of business." Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-86 (1972). On the other hand, the delegation doctrine remains active in state decisions, due to the states' antipathy to discriminatory administration and uncertainty of standards. L.L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 76-77 (1965); see, e.g., *State v. Williams*, 253 N.C. 337, 347, 117 S.E.2d 444, 451 (1960).

219. See generally DAVIS, ADMINISTRATIVE LAW TEXT §§ 2.01-2.08 (3d ed. 1975).

220. See *supra* text accompanying note 213.

221. See *supra* text accompanying notes 199-213.

222. See *supra* note 212 and accompanying text.

approval evaluation.

IV. POST-AMENDMENT ANALYSIS

The implications of the *LaBarge* decision were amplified by the recent proliferation of private schools.²²³ With state access depending solely on these schools' voluntary registration,²²⁴ reform of Vermont's private school regulations became imperative. In 1981 and 1982, several proposals were considered by the Vermont Legislature.²²⁵ As a result of much deliberation,²²⁶ Act 151 was enacted into law on April 13, 1982.²²⁷

Act 151 provides a coordinated statutory scheme for the regulation of private and public schools. Its scope encompasses: compulsory attendance,²²⁸ course of study requirements,²²⁹ home study program rules,²³⁰ public school approval requirements,²³¹ state registration and reporting requirements of private schools,²³² private school approval requirements,²³³ and state board powers and duties.²³⁴

The scheme corrects some of the pre-amendment weaknesses by using more clearly defined and self-contained language. "Equivalent education," for example, has been totally deleted,²³⁵

223. In Vermont alone there are at present over twenty fundamentalist schools. Letter from Rev. Paul Weaver to Deborah McCoy (October 1981) (on file with the *Vermont Law Review*). See *supra* notes 3-6 and accompanying text for growth trends nationwide.

224. See *supra* text following note 209.

225. See *supra* notes 27-30 and accompanying text.

226. Study of the various proposals was made by the Senate Education Committee, *supra* note 5, the Senate Judiciary Committee, *supra* note 27, and the House Education Committee, *supra* note 27.

227. Bill number S.R. 170 was passed by the Senate on March 27, 1981, VT. SENATE J. 372 (Bien. Sess. 1981), and a version of the same bill was passed by the House on February 17, 1982, VT. HOUSE J. 183-86 (Adj. Sess. 1982). To coordinate the two versions, a Committee of Conference was appointed by the Senate on February 26, 1982, VT. SENATE J. 210 (Adj. Sess. 1982), and by the House on March 4, 1982, VT. HOUSE J. 278 (Adj. Sess. 1982). The coordinated bill from this committee was adopted by the House on March 31, 1982, VT. HOUSE J. 526-28 (Adj. Sess. 1982) and by the Senate on April 6, 1982, VT. SENATE J. 414-16 (Adj. Sess. 1982). As a result, Number 151, An Act Relating to Private Schools, was signed by Governor Snelling on April 13, 1982, VT. SENATE J. 561 (Adj. Sess. 1982).

228. VT. STAT. ANN. tit. 16, §§ 1121, 1127 (Supp. 1982).

229. *Id.* § 906.

230. *Id.* §§ 164(14), 166a.

231. *Id.* § 165.

232. *Id.* § 165a.

233. *Id.* § 166.

234. *Id.* § 164.

235. *Id.* § 1121. Compare § 1121 with VT. STAT. ANN. tit. 16, § 1121 (1974).

and a definition of "approved private school" has been added which is specifically restricted in scope to the new section 166.²³⁶ These changes plainly demonstrate legislative intent to avoid the interchangeability of "approval" and "equivalence" as addressed in the *LaBarge* decision.²³⁷ In addition, Act 151 offers private schools an option to avoid state approval altogether.

A. *The Reporting Private School Act*

The scheme contemplated by Act 151 gives the private school a choice between applying for "approval,"²³⁸ or "reporting"²³⁹ to the state. The Reporting Private School Act²⁴⁰ requires reporting

236. VT. STAT. ANN. tit. 16, § 11(20) (Supp. 1982).

237. To further clarify the legislative intent of amended section 166, the legislature also could have eliminated from that section the term "approval." By substituting "qualification" for "approval," the legislators would have enforced noninterchangeability, and would also have avoided the connotation of "endorsement." The state is not constitutionally empowered to endorse private church-schools. See *supra* text accompanying note 46. Such state action poses entanglement problems. "Qualification" connotes a relation only to compliance with the act's criteria. Therefore, not only would the use of the word "qualification" be constitutionally more appropriate, but it would more accurately reflect the statute's intended function.

The Vermont Board of Education propounded this change in its proposal, An Act to Amend 16 V.S.A. § 166 Relating to Approval of Private Schools (on file with the Vermont Dep't Educ.). This proposal was ratified by the State Board of Education in 1981, but was never officially proposed before the state legislature because it did not receive a sponsor.

238. VT. STAT. ANN. tit. 16, § 166.

239. *Id.* § 165a (Supp. 1982).

240. § 165a. Reporting private schools

(a) On presentation in proper form, the state board or its designee shall accept and file a report under this section. No report may be filed earlier than three months before the school year begins.

(b) A report under this section is in proper form if it contains:

(1) a statement of the hours and days the school will be in session for the remainder of the school year; and

(2) a statement of the school's objectives which includes, at minimum, the following:

(A) the school will prepare and maintain attendance records for each pupil enrolled or regularly attending classes;

(B) at least once each year the school will assess each pupil's progress and will maintain records of that assessment;

(C) the school will have teachers and materials sufficient to provide the minimum course of study; and

(D) the school's course of study will include the minimum course of study.

(c) A reporting private school shall provide to the person responsible for each of its pupils a copy of its currently filed statement of objectives and a copy of this section. The copy shall be provided when the pupil enrolls or before September 1, whichever comes later. Failure to comply with this section may create a permissible inference of false advertising in violation of §

private schools to submit records of the names and addresses of their pupils upon enrollment and termination, pupil attendance, school objectives, school session length, and the adequacy of its teachers, materials, and course of study. Although the statute requires a minimum course of study²⁴¹ as defined in section 906,²⁴² the Reporting Private School Act does not give the state the power to evaluate the reporting private school's course of study beyond this threshold level nor does it provide the state with the power for on-site inspection or review of the reported criteria. This compromise measure was acceptable to the fundamentalists²⁴³ who felt they should furnish attendance information²⁴⁴ but could not accept on-site inspection.²⁴⁵ The reason fundamentalists are reluctant to interface with the state in any fashion, according to Reverend Weaver, spokesman for a group of fundamentalist schools in Vermont,²⁴⁶ is that the state's presence can be intimidating and is an unnecessary intrusion to the church.²⁴⁷ Reverend Weaver stated that the fundamentalist schools could accept making a statement as to the school's activities or signing a form as to this information if the burden of proof were on the Department of Education to disprove these things once the statement was made.²⁴⁸

In addition, the Reporting Private School Act does not require

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(d) Failure to comply with the minimum course of study, as reported to the commissioner of education, and to the person responsible for each pupil, is subject to the provisions of 9 V.S.A. chapter 63 and all the remedies provided therein.

(e) Each reporting private school shall provide to the commissioner on October 1 of each year the names and addresses of its enrolled pupils. Within seven days of the termination of a pupil's enrollment, the reporting private school shall notify the commissioner of the name and address of the pupil. The commissioner shall forthwith notify the appropriate school officials as provided in section 1126 of this title.—Added 1981, No. 151 (Adj. Sess.), § 7.

VT. STAT. ANN. tit. 16, § 165a (Supp. 1982).

241. *Id.* § 165a(b)(2)(D), (d).

242. *Id.* § 906.

243. "[I]t is our unanimous vote that we can fully support S.170 . . . in its present form We believe that it reflects a dedicated effort [dealing] with our concerns directly." *House Educ. Comm. Hearing, supra* note 27, at 4 (testimony of Rev. Paul Weaver, representing Christian Schools of Vermont).

244. *Id.* at 20.

245. *Id.* at 13.

246. Rev. Paul Weaver is President of the Christian Schools of Vermont and pastor of Trinity Baptist Church, Williston, Vermont. See *Senate Educ. Comm. Hearing, supra* note 5, at 3, 12.

247. *Id.* at 8.

248. *Id.* at 13.

state "approval" of its program and so affords the fundamentalists, who view state approval requirements as an invasion of their right to freely exercise their religion,²⁴⁹ an alternative to state approval which is somewhat more acceptable.²⁵⁰ If a private school opts to report under section 165a, that school's report fulfills the state's qualification requirements, and there is no need for a reporting school to submit to state approval.

As an assurance of adequate education, the Reporting Private School Act may fail in its essential purpose. The statute does not require reporting private school reports to be made in good faith. There are no sanctions to compel the submission of accurate enrollment records. There is no provision for state inspection or policing of each private school's curriculum, teachers, or facilities. Evaluation of each private school cannot be initiated by the state in any way. Only the person responsible for a pupil may activate state evaluation of the private school's curricular standards by initiating a complaint to the Commissioner of Education. Robert B. Luce, Legal Counsel for the Vermont Department of Education, wrote of the statute:

The State Board of Education is given no authority to inspect reporting schools or to take any action when it has reason to believe that a reporting school is not meeting its stated objectives. Enforcement of requirements is left up to States Attorneys or the Attorney General who may file criminal charges for false advertising. Successful prosecution requires a complaint and proof "beyond a reasonable doubt" that stated objectives are not being met.²⁵¹

The weakness in this procedure is that the educational deficiency is discovered *after* the pupil has suffered an inadequate education. The Nebraska Supreme Court described this dilemma: "If the deficiency of the education being afforded is not discovered until the end of the year, the child has wasted that year."²⁵² The Reporting

249. See *supra* text accompanying notes 10-19.

250. See, e.g., *House Educ. Comm. Hearing, supra* note 27, at 17-18 (testimony of Rev. Albert Collins). "[W]e appreciate that category of reporting private school . . . So I appreciate the opportunity that this bill provides . . . without the aspect of control and licensure." *Id.*

251. Memorandum for Vermont Dep't Educ., Robert B. Luce, Legal Counsel to Vermont Board of Educ. (discussing S.R. 170, Registration of Private Schools) (February 11, 1982), reaffirmed as applicable to Act 151 in a letter from Robert B. Luce to Deborah S. McCoy (October 27, 1982) (on file with the *Vermont Law Review*).

252. *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 817, 301 N.W.2d 571,

Private School Act, in fact, may prove to be little better than the pre-amendment statutory scheme, because the control of adequate alternative education remains at the caprice of the private school operator.

B. *The Private School Approval Act*

The amended Private School Approval Act,²⁵³ on the other hand, requires an affirmative finding by the state, after an opportunity for a hearing, as to whether the applying school is providing a minimum course of study and whether it substantially complies with the board's rules for approved private schools. To some fundamentalists, this standard is more intrusive than the reporting school standard because it requires state evaluation and because the "approval" language implies endorsement.²⁵⁴

579 (1981).

253. § 166. Approval of private schools

(a) On application, the state board shall approve a private school if it finds, after opportunity for hearing, that the school provides a minimum course of study and that it substantially complies with the board's rules for approved private schools. Approval may be granted without state board evaluation in the case of any school accredited by a private, state or regional agency recognized by the state board for accrediting purposes.

(b) Approvals under this section shall be for a term established by rule of the board but not greater than five years.

(c) An approved private school shall provide to the person responsible for each of its pupils, prior to accepting any money for that pupil, an accurate statement in writing of its status under this section, and a copy of this section. Failure to comply with this provision may create a permissible inference of false advertising in violation of § 2005 of 13 V.S.A.

(d) Each approved private school shall provide to the commissioner on October 1 of each year the names and addresses of its enrolled pupils. Within seven days of the termination of a pupil's enrollment, the approved private school shall notify the commissioner of the name and address of the pupil. The commissioner shall forthwith notify the appropriate school officials as provided in section 1126 of this title.

(e) The state board may revoke or suspend the approval of a private school, after opportunity for hearing, for substantial failure to comply with the minimum course of study, for failure to comply with the board's rules for approved private schools, or for failure to report under subsection (d). Upon revocation or suspension, students enrolled in that school shall become truant unless they enroll in an approved public school, approved or reporting private school or approved home instruction program. Amended 1981, No. 151 (Adj. Sess.), § 8.

Vt. STAT. ANN. tit. 16, § 166 (Supp. 1982).

254. See, e.g., *House Educ. Comm. Hearing, supra* note 27, at 19 (testimony of Rebecca Merriam) "It is a . . . usurpation . . . of private enterprise when . . . [t]he State Board make[s] rules for approved private schools" *Id.*

The minimum course of study is emphasized throughout Act 151. The Act defines the minimum course of study as:

learning experiences adapted to a pupil's age and ability in the fields of:

- (1) Basic communications skills, including reading, writing, and the use of numbers;
- (2) Citizenship, history, and government in Vermont and the United States;
- (3) Physical education and principles of health including the effects of tobacco, alcoholic drinks, and drugs on the human system and on society;
- (4) English, American and other literature; and
- (5) The natural sciences.²⁵⁵

These requirements are a prerequisite for public school,²⁵⁶ private school,²⁵⁷ and home study program approval,²⁵⁸ and must be included in reporting private school reports as well.²⁵⁹ The Vermont State Legislature has included a minimum course of study requirement in every type of instruction under Vermont's statutory scheme and, therefore, has illustrated its conceded interest in providing at least a base-line standard of education for its citizens²⁶⁰ under Act 151.

To explain the need for the inclusion of such "obvious" requirements, one representative for the state said,

The purpose of the bill is to enable . . . the state to step in . . . if [the private school] does not teach reading because there is a philosophy that children should not read [T]here are groups in existence that have that kind of philosophy. We have had experiences where children were gathered in what were called schools, but not receiving even the most basic education²⁶¹

The Act also requires that the names and addresses of all pupils enrolled in reporting private schools,²⁶² approved private

255. VT. STAT. ANN. tit. 16, § 906(b) (Supp. 1982).

256. *Id.* § 165.

257. *Id.* § 166.

258. *Id.* § 166a.

259. *Id.* § 165a.

260. See *supra* notes 180-81 and accompanying text.

261. *Senate Jud. Comm. Hearing, supra* note 27, at 7 (testimony of Robert B. Luce, Counsel for Vermont Dep't Educ.). See also Page, *Church in 'Spiritual Warfare,' Burns Recordings, Tapes, Books*, Burlington Free Press, Oct. 5, 1982, at 1, col. 1.

262. VT. STAT. ANN. tit. 16, § 165a(e) (Supp. 1982).

schools,²⁶³ or approved home study programs²⁶⁴ be provided to the state annually. Requiring registration in all private educational programs maintains the effectiveness of the compulsory-attendance statute and furthers the state goal to ensure adequate education for all its citizens. The amended Private School Approval Act remedies the ineffectiveness of its pre-amendment counterpart by specifically using the sanction of truancy²⁶⁵ to enforce substantial compliance with the minimum course of study and any rules promulgated by the State Board of Education for approved schools.

The amended Private School Approval Act authorizes self-regulation for "any school accredited by a private, state or regional agency recognized by the state board for accrediting purposes."²⁶⁶ Self-regulating bodies or agencies have been utilized in Vermont for the regulation of Roman Catholic parochial schools.²⁶⁷ This has been a satisfactory arrangement with the state and was offered by the state in negotiations with the fundamentalist leaders as an alternative to direct state regulation.²⁶⁸ The provision in subsection (a) of the amended Private School Approval Act evidences the state's intent to offer this as a viable alternative to direct regulation by the state.²⁶⁹ However, the Private School Approval Act, even with this option, was rejected by the fundamentalists.²⁷⁰ As a fundamentalist leader explained:

263. *Id.* § 166(d).

264. *Id.* § 166a(d).

265. *Id.* § 166(e).

266. *Id.* § 166(a).

267. *Senate Educ. Comm. Hearing, supra* note 5, at 11 (testimony of Sen. Richard Soule).

Robert B. Luce, Legal Counsel for the Vermont Department of Education, explained the self-review system in this way:

[A]ny institution, any school accredited by any accrediting institution recognized by the state board for that purpose is essentially exempt from [state] review. They are recognized as approved: recognized as registered They are not subject to review by the state as long as they continue to be accredited. The Catholic Diocese in this state accredits its own schools. They have grouped together, formed an accrediting agency, . . . developed rules: a system for accreditation . . . which system has been approved by the [state] board. They are outside the system [of state review].

Senate Jud. Comm. Hearing, supra note 27, at 16 (testimony of Robert B. Luce).

268. Interview with Robert B. Luce, Legal Counsel for the Vermont Dep't Educ., in Montpelier, Vermont (October 16, 1981).

269. VT. STAT. ANN. tit. 16, § 166(a) (Supp. 1982).

270. *Senate Educ. Comm. Hearing, supra* note 5, at 12 (testimony of Rev. Paul Weaver).

Each of our churches and schools are autonomous, independent in their structure . . . [Although] I am representing the Christian Schools of Vermont, . . . I could not, as president of the group, see how I could . . . go into another clergyman's school and make the judgment as to whether that [school] was complying with . . . things . . . set upon me by the State Board of Education.²⁷¹

The lack of uniformity of belief among the many fundamentalist schools makes impossible the creation of a regulating body under their religious auspices. With Biblical interpretation differing from clergyman to clergyman, there is no exact commonality of beliefs among the various fundamentalist church-schools.²⁷² Therefore, although the Private School Approval Act contemplates regulation only of secular subjects, fundamentalist ministers believe that even a self-regulating agency would be an untenable intrusion into the religious freedom of that facility.²⁷³ Perhaps even more basically, fundamentalists suspect the self-review process as a toe-hold for state oversight of their institutions. As one fundamentalist leader explained:

[The] particular accrediting procedure that the Catholic Diocese has makes the Catholic Diocese a surrogate of the state and they have to submit [their agency's process] to the state . . . [This] is a dangerous way to go because once the foot is in the door it will be more regulation and more regulation and more regulation²⁷⁴

The Department of Education, on the other hand, believes that the self-review system provides an alternative to state review which is tantamount to an exempt status.²⁷⁵

Subsection (c) of amended section 166, the Private School Approval Act,²⁷⁶ substantially follows the provisions of the pre-

271. *Id.*

272. Interview with Robert B. Luce, *supra* note 268.

273. *Senate Educ. Comm. Hearing, supra* note 5, at 8-12 (testimony of Rev. Paul Weaver).

274. *Senate Educ. Comm. Hearing, supra* note 5, at 11-12 (testimony of Rev. Paul Weaver).

275. Robert B. Luce, Legal Counsel for the Vermont Dep't Educ., stated that any school accredited by a self-regulating agency would be "essentially exempt from review They don't have to go through any kind of process. They are not subject to review by the state as long as they continue to be accredited They are outside the system." *Senate Jud. Comm. Hearing, supra* note 27, at 16 (testimony of Robert B. Luce).

276. VT. STAT. ANN. tit. 16, § 166(c) (Supp. 1982).

amendment Private School Approval Act²⁷⁷ by requiring all private schools to provide an accurate written statement of its status to the person responsible for each of its pupils, before accepting any money for that pupil. Subsection (c) of amended section 165a, the Reporting Private School Act,²⁷⁸ requires the reporting school to provide a copy of its currently filed statement of objectives to the person responsible for each of its pupils. These provisions are consumer protection clauses²⁷⁹ and fulfill the state function of ensuring, by means of its police power, that each private school program will provide basic minimum curricula according to state standards.

C. The Compulsory Attendance Act

Act 151 also encompasses an amended version of section 1121, the Compulsory Attendance Act.²⁸⁰ This statute was designed to work in conjunction with the amended Private School Approval Act.²⁸¹ The current section 1121 resolves the ambiguities in the relationship between the pre-amendment Compulsory Attendance Act and the pre-amendment Private School Approval Act which were identified in the *LaBarge* decision.²⁸²

The amended Compulsory Attendance Act²⁸³ requires persons having legal custody of children between seven and sixteen years old to send such children to "an approved public school or an approved or reporting private school for the full number of days for which that school is held"²⁸⁴ This language offers a parent a choice between sending his or her child to a public or private school which has been qualified pursuant to sections 165 and 166. The change in the wording is significant in several respects. First,

277. *Id.* § 166(c) (1974).

278. *Id.* § 165a(c) (Supp. 1982).

279. The standard is the objectives as stated by the school . . . [which] shall include . . . basic programs of study [The school provides] parents with a statement of [its] objectives. If [it does] not live up to those objectives, a parent may complain and the school's registration may be revoked. It is in the nature of a consumer fraud provision.

Senate Jud. Comm. Hearing, supra note 27, at 10 (testimony of Robert B. Luce) (discussing S.R. 170, § 166a(f) as passed by the Senate, which was enacted with some changes as Vt. STAT. ANN. tit. 16, § 165a(c) (Supp. 1982)).

280. Vt. STAT. ANN. tit. 16, § 1121 (Supp. 1982).

281. *Id.* § 166.

282. See *supra* text accompanying note 200; see also *The Equivalency Exception, supra* note 197.

283. Vt. STAT. ANN. tit. 16, § 1121 (Supp. 1982).

284. *Id.*

the statute requires that public schools be approved to qualify under this section, thus taking away the presumption that public schools are *per se* qualified institutions. Public schools must now meet qualification standards similar to that of private schools to avoid the truancy sanction.²⁸⁵ Second, the clause takes private school attendance out of the category of "exceptions" and gives it an affirmative status equal to that of public school attendance.²⁸⁶ This change reflects the dramatic impact the private school has had upon the educational posture of the state. Third, the clause, by specifying "approved private or public school," activates sections 11(18) and 11(20) of Title 16, which restrict the meaning of "approved" to sections 165²⁸⁷ and 166²⁸⁸ for the purpose of compulsory-attendance requirements. This provision thus establishes an affirmative relationship between the Compulsory Attendance Act and the Approval statutes.

Subsections 1 through 4 of amended section 1121 contain notable changes in the exceptions to the compulsory rule,²⁸⁹ the most significant of which is "an approved program of home instruction"²⁹⁰ to substitute for the pre-amendment exception of "equivalent education."²⁹¹ The change discards ambiguous general terminology and replaces it with a specific exception defining which educational programs the legislature intended to qualify as exemptions to compulsory attendance. This explication eliminates

285. *Id.* § 165. See *supra* text accompanying notes 256-60.

286. Compare VT. STAT. ANN. tit. 16, § 1121 (1974) with VT. STAT. ANN. tit. 16, § 1121 (Supp. 1982).

287. *Id.* § 165 (Supp. 1982).

288. *Id.* § 166.

289. Act 151 adds a new section to Vermont's statutory scheme, VT. STAT. ANN. tit. 16, § 166a (Supp. 1982). Section 166a of Title 16 deals with the regulation of home study programs, and specifies certification and approval requirements. This section authorizes the Commissioner of Education to approve home study programs, as opposed to determining "equivalency" under the pre-amendment statute, Title 16, section 1121(b). Since the pre-amendment section 1121(b) gives similar power to the State Department of Education to determine "equivalency," the new section 166a provision follows the legislative purpose of the pre-amendment statute. The Approval of Home Study Programs Act, however, provides two specific guidelines which the state must follow in the approval process. Academic subject matter requirements must be met before the program may be approved. The act also provides for a hearing for applicants seeking approval of their program and prior to revocation or suspension of approval of such a program. VT. STAT. ANN. tit. 16, § 166a(a), (e) (Supp. 1982). These additions furnish constitutional safeguards from "unwarranted delegation[s] of legislative power" to the board of education and from the danger of arbitrary enforcement. See *supra* notes 216-19 and accompanying text.

290. VT. STAT. ANN. tit. 16, § 1121(2) (Supp. 1982).

291. *Id.* § 1121(a) (1974).

the problem, addressed in the *LaBarge* decision, of borrowing the sanctions of one statute to effectuate another without a clear demonstration of legislative intent to support such action.²⁹²

These subsections also indicate by implication that sections 165, 165a, and 166 afford the only standards for qualified school attendance in the post-amendment statutory scheme because there is no exemption from truancy available under these subsections for attendance at an unapproved or nonreporting school. In addition, the inability of the state to prosecute the parents of children not attending an approved public or qualifying private school is eliminated under the amended Compulsory Attendance Act. Under this scheme, if the state has no access to an unexcused child's attendance status, it is because that child is not attending an approved public or qualified private school. This absence is grounds for truancy prosecution.

D. *The Propriety of Act 151's Minimal Standards*

The United States Supreme Court holds that the state has a duty to protect the quality of education afforded its citizens through its police powers.²⁹³ In order to do so, the state must be able to account for all its school-age citizens in school programs and to evaluate such programs to ensure that a minimum course of study is being provided. Act 151 provides for state access to attendance records by requiring each qualifying school or program under sections 165a, 166, and 166a to file the names and addresses of those attending that school or program with the state.²⁹⁴ By utilizing this system, the state can fulfill its responsibilities to all its citizens in a simple, efficient way.

Other states have endorsed such provisions in their regulatory schemes. In *Roloff Evangelistic Enterprises v. State*,²⁹⁵ for example, the Texas court held that the Texas Child Care Licensing Act, which establishes statewide minimum standards for safety of children, ensures maintenance of those standards by inspection and interviews, and regulates conditions in child care facilities through a program of licensing for the purpose of protecting the physical

292. See *supra* text accompanying notes 199-200.

293. *Board of Educ. v. Allen*, 392 U.S. 236 (1968). See *supra* note 179 and accompanying text.

294. VT. STAT. ANN. tit. 16, §§ 165a(e), 166(d), 166a(d) (Supp. 1982); see also *id.* § 165(b).

295. *Roloff Evangelistic Enter., Inc. v. State*, 556 S.W.2d 856 (Tex. Cir. App. 1977).

and mental well-being of children residing in those facilities, did not in any way infringe upon or conflict with the religious beliefs or religiously oriented facilities.²⁹⁶

On the other hand, the state's police powers are not without limitation: state courts have found them limited to the reasonable preservation of public safety, health, or morals.²⁹⁷ In addition, such regulations might be an unconstitutional entanglement between church and state. Even if such a regulation only required publication of the church-school's status, and not the submission of the church-school to direct state approval, it would be constitutionally permissible. Noncompliance with the state licensure would indicate substandard conditions. If the publicized, unapproved status of the church-school discourages enrollment, the church-school could claim that publication of this information constitutes an unconstitutional entanglement between church and state.

Furthermore, some fundamentalists argue that state educational standards are inadequate even to fulfill the state's own goal of providing a minimal level of education to its citizens. Duncan Kilmartin, spokesman for the National Organization of Christian Schools, asserts that the standards set for public education are inadequate as educational prerequisites. In the *Freeman's Report*,²⁹⁸ a treatise discussing whether the state has the right and the credentials to arbitrate educational standards, Kilmartin relies heavily on a magazine article reporting a decline in United States public schools' teaching standards.²⁹⁹ The article suggests that the quality of education in this country is declining, citing instances of

296. [T]he legislative intent underlying the Child Care Licensing Act [is] ". . . to protect the health, safety, and wellbeing of the children of the state who reside in child care facilities."

To accomplish this intent, the Act establishes state wide minimum standards for the safety of such children, insures maintenance of these standards by inspection and interviews, and regulates conditions in the facilities through a program of licensing.

Id. at 858-59.

The statute's "provisions do not in any way conflict with appellants' beliefs, nor do they restrict the exercise of those beliefs in any way." *Id.* at 859.

297. *State v. Williams*, 253 N.C. 337, 341, 117 S.E.2d 444, 447 (1960). The court cited a number of state cases supporting this proposition, among them *Grow System School v. Board of Regents*, 277 App. Div. 122, 98 N.Y.S.2d 834 (1950), which struck down as unconstitutional legislation that required state approval of trade school tuition charges before a license would be issued. *State v. Williams* at 337, 117 S.E.2d at 448.

298. D. Kilmartin, *supra* note 3.

299. *Help! Teachers Can't Teach!*, *TIME*, *supra* note 3, at 54-63.

teacher incompetency,³⁰⁰ statistics on the drop in S.A.T. scores over the last decade,³⁰¹ and inadequate educational reform.³⁰²

The *Freeman's Report* confuses normative with descriptive standards. The state cannot be accountable for every mediocre teacher in the educational system, and regulatory legislation alone will not correct the system's failings. Minimal standards, however, are better than none at all. Legislation can set basic educational requirements which will standardize, on a threshold level, public expectations of the core skills necessary for successful assimilation into society. However, the *Freeman's Report* is helpful in that it offers a yardstick by which to measure the amended statutory scheme:

The State's interest in compulsory attendance only arises when the State has: first, defined appropriate education for various age levels; second, given full and complete due process notice of those standards of equivalent education to all concerned; and third, determined if the child . . . is receiving an equivalent education either in his home or at a nonpublic school.³⁰³

All of the qualifying statutes encompassed in Act 151 fulfill these three criteria. The first requirement is met by the minimum course of study defined in section 906 and required as a measure of qualification in sections 165(a), 165a(b)(C), and 166a(a).³⁰⁴ The opportunity for a hearing prior to state action relating to a school's or program's change in qualifying status, found in sections 165(a), (c), 166(a), (e), and 166a(a), (e), fulfills the second requirement.³⁰⁵ Finally, the third requirement is met by the standards provided under the qualifying statutes, sections 165 through 166a, and by the compulsory-attendance requirements therein.³⁰⁶

V. CONCLUSION

The effect of *State v. LaBarge* was to undermine the laws on compulsory education and approval of private schools. Had no legislative action been taken, the harm caused by this impotence

300. *Id.* at 55, 57.

301. *Id.* at 58.

302. *Id.* at 54.

303. D. Kilmartin, *supra* note 3, at 5.

304. VT. STAT. ANN. tit. 16, §§ 165(a), 165a(b)(C), 166(a), 166a(a) (Supp. 1982).

305. *Id.* §§ 165(a), (c), 166(a), (e), 166a(a), (e).

306. *Id.* §§ 165(c), 166(e), and 166a(e) (Supp. 1982).

might have been felt in the welfare and criminal justice systems of the state if children were thrust into society with inadequate preparation.³⁰⁷ Following the *LaBarge* interpretation of the pre-amendment statutory scheme, private schools could create any substantive program and refuse to register or to be inspected without fear of sanction. Not only were the requirements for private school approval in Title 16, section 166 unenforceable, but they were so open-ended that they may have been unconstitutionally void for vagueness and overbroad.³⁰⁸ They were, in essence, deregulatory regulations, which could lead, as a North Carolina educational official predicted when that state deregulated, to having "some children play poker at night for nine months [in order to receive] a diploma."³⁰⁹

Education is arguably essential in today's world. Without such basic skills as reading, computation, and language arts, tomorrow's adults could be isolated and jobless. Without a sense of history, citizens will find it difficult to make responsible political choices. Our freedom, in short, rests on our educational opportunity. It is the state's duty to afford its citizens this opportunity.

Under Vermont's pre-amendment statutory scheme, the North Carolina experience could have been repeated here.³¹⁰ Since the Vermont Board of Education could not locate private schools, or enforce regulations on educational curricula if it did, the North Carolina illustration might have forecast a vision of the future of Vermont's educational system.

With this in mind, the Vermont Legislature enacted Act 151, a coordinated system of amendments and additions to the regulation of education in the state. Certain themes recur throughout the leg-

307. *Senate Jud. Comm. Hearing, supra* note 27, at 3 (testimony of Robert B. Luce).

308. *See supra* text accompanying notes 212-14.

309. *Sectarian Education, supra* note 193, at 834-35, quoting Brown, *Private Schools Held Free of N.C. Standards*, *Durham Morning Herald*, Oct. 5, 1979, at § A, at 1, col. 2 (quoting Durham County Schools Superintendent Frank Yeager).

310. Robert Luce said of the pre-amendment statutory scheme:

If [private] schools are not going through the [approval] process, [the state] has no information as to what is occurring We have no access to the program in effect at the private school or in the home. That was what put us in the situation where it was impossible to prosecute anyone

We have no way of knowing, under the current law, whether [children] are studying or not, or whether they are attending some small private school that no one . . . knows exists.

Senate Jud. Comm. Hearing, supra note 27, at 5-6 (testimony of Robert B. Luce).

isolation. First, the noninterchangeability of statutory terms and sanctions reaffirms the *LaBarge* decision.³¹¹ Second, the approval restriction of public school attendance and the elevation of private school attendance from the section 1121 exceptions to coequality with public school attendance reflects certain trends in today's society.³¹² In addition, each public or private educational program is required to register with the state and submit names and addresses of all pupils attending such program or school. Finally, each public or private educational program must provide a minimum course of study as defined within the act. These basic themes represent concessions to the fundamentalists and justifications for state regulation of education.

Act 151 clearly demonstrates the legislature's intent to avoid the *LaBarge* interchangeable language problem by deleting the term "equivalent" and defining the term "approved" as relating solely to the approval statutes. The compulsory-attendance requirements reflect recognition of the impact of private schools on our society. Private schools are growing in number and represent a substantial portion of the educational facilities of this country.³¹³ A policy of deference to the private education sector is implemented throughout Act 151 by segregating each type of private instruction into an independent statute with its own set of criteria.

More difficult to understand, however, was the legislators' solution to registration and minimum course of study requirements. Despite the careful language delineating those requirements in each section of the act, the Reporting Private School Act may become a loophole whereby private schools can escape regulation. There is no requirement that reporting private schools report in good faith, and, except for the enforcement of its curricula requirement, there are no sanctions for inaccurate reporting, and there is no provision for an independent and impartial inspection of these schools to ensure that the reporting is accurate. Whether the Reporting Private School Act represents an acceptable concession by creating an escape valve, or whether its very presence destroys the

311. See *supra* text accompanying notes 200, 236-37.

312. See *supra* text accompanying notes 300-04.

313. See *supra* notes 4-5 and accompanying text.

force of the entire scheme by creating an uncontrollable leak in the system, is an open question.³¹⁴

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314. In voting against S.R. 170 on February 17, 1982, Representative Bloomberg of Burlington explained, "I fear that this is the beginning of the breakdown of state supervision of our schools." 1982 Vr. House J. 186 (Adj. Sess.). If he is right, then the efforts of the legislature in drafting Act 151 will not have remedied the ineffectiveness of Vermont's private school regulation statutes. It will merely have traded one loophole for another.