Education, Caesar's or God's: A Constitutional Question of Jurisdiction

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FOUNDATION FOR EDUCATIONAL LIBERTY

> "It is lawful for us to give tribute unto Caesar or no? ... And he said unto them, Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's."[1]

Lord Acton, the great 19th-century English political theorist and historian, acclaimed this statement of Jesus Christ's as the great turning point in man's historic efforts to establish true liberty within the order enforced by the State. Prior to Christ's ministry on earth, Acton acknowledged that many great men had attempted to solve the problem of unlimited State authority. But, in Acton's opinion, those men had failed to draw any more than a "metaphysical barrier" to that authority:

> "All that Socrates could effect by way of protest against the tyranny of the reformed democracy was to die for his convictions. The Stoics could only advise the wise man to hold aloof from politics, keeping the unwritten law in his heart."[2]

What distinguished these philosophers from Christ was, in Acton's opinion, that Jesus had "not only delivered the precept, but created the force to execute it." What was this force? Unmistakably, Acton believed it to be the Spirit of truth that descended upon the Church at Pentecost:

> "To maintain the necessary immunity in one supreme sphere, to reduce all political authority within defined limits, ceased to be an aspiration of patient reasoners, and was made the perpetual charge and care of the most energetic institution and the most universal association in the world. The new law, the new spirit, the new authority, gave to liberty a meaning and a value it had not possessed in the philosophy or in the constitution of Greece or Rome before the knowledge of the truth that makes us free."[3]

The truth of Acton's statement was proved soon after the Church was established at Pentecost. In the Book of Acts, it is recorded that Peter and the other apostles refused to obey the Jewish ruling officers of the Roman Empire who had ordered them to atop "teaching" in the name of Jesus. The apostles denied that the State, through its department of religion, had any such authority. "We ought to obey God rather than men."[4]

Despite this direct challenge to their authority the ruling council did not exercise its full power to stop the infant church. They had been persuaded by one of their members, Gamaliel, a Jewish lawyer with a great reputation, to leave the apostles alone.

> "And now I say unto you, Refrain from these men, and let them alone: For if this counsel or this work be of men, it will come to nought: But if it be of God. ye cannot overthrow

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1. Luke 20:22, 25. (All scripture quotes are from the King James Version).
2. J.E.E.D. Acton, ESSAYS ON FREEDOM AND POWER 81 (1956).
3. *Id.*
4. Acts 15:21-29.Acts 15:21-29.

> it; lest haply ye be found even to fight against God."[5]

By this statement Gamaliel recognized the "reality" that over 1800 years later Lord Acton would acknowledge as the bedrock of individual liberty in civil government: "If the Son therefore shall make you free, ye shall be free indeed."[6]

How did Jesus Christ bring this freedom to the people? He did it by teaching the Truth. And He warned those who "believed on him" that they must "continue in ... (His) word ... if they were to know the truth" that shall make them free.[7] Thus, education guided by the Spirit of Truth became the central mission of the early church. And it was education that the apostles claimed in Acts, Chapter 5, to belong to God, and not to the state.

Today, in 20th-century America Christians have conceded far more to the government than did the early apostles. They have not only allowed the government to exercise authority over private schools, including church-related schools, but they have allowed the government to dominate the "teaching" of their youth in public schools across the nation without even asking the question whether education is one of "the things which be Caesar's."

Whether education is "of government" is a question critical to our liberty. Civil libertarians, who are typically sensitive to issues affecting liberty, have assumed that government-financed and operated schools are no threat to liberty. Yet, one of their leading thinkers, John Stuart Mill, wrote otherwise. In his renowned work, On Liberty, Mill warned that State control of education would lead to despotism:

> A general State education is a mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in the government - whether this be a monarch, a priesthood, an aristocracy, or the majority of the exisating generation - in proportion as it is efficient and successful, *it establishes a despotism over the mind, leading to natural tendency to one over the body*.[8] (Emphasis added)

Mill like Jesus, knew that the key to liberty was the freedom of the mind from control by the State or any other human power. But, unlike Jesus, Mill allowed the State a supportive role: to assist self-supported schools and to create government schools "when society in general is in so backward a state that it could not or would not provide for itself any proper institutions of education unless the government undertook the task ..."[9]

Mill's pragmatic exception has become the guiding principle for many Americans. As Judge Irving Kaufman of the Untied States Court of Appeals so tellingly stated in an opinion written in November

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5. Acts 5:38-39.
6. John 8:36.
7. John 8:31-32.
8. J.S. Mill, ON LIBERTY 129 (Library Arts ed. 1956).
9. *Id.* at 129-130.

1980:

> "To many Americans, the state's noblest function is the education of our nation's youth. We entrust this reaponsibility largely to the public schools, and hope our children grow into responsible citizens by learning the enduring values of Western Civilization we all share - an appreciation of critical reasoning. a commitment to democratic institutions, and a dedication to principles of fairness." (Emphasis added)[10]

Yet, the "hope" of public education of which Judge Kaufman spoke has not been fulfilled. Rather, it has been overwhelmed by widespread nonpartisan disillusionment. As *Time* magazine has reported:

> Like some vast jury gradually and reluctantly arriving at a verdict, politicians. educators, and especially millions of parents have come to believe thai the U.S. public schools are in parlous trouble ... High school graduates ... sue their school systems ... Experts confirm that students today ... know less. A Government ... survey ... reports that ... the achievement of U.S. 17-year-olds has dropped regularly over the decade.[11]

Newsweek magazine reported a year later:

> Academic standards seem to get flimsier by the year. Costs per pupil are rising at the same time enrollments are falling and budgets shrinking. Administrators are overwhelmed with paperwork; teachers have to contend with drugs and alcohol. truancy and vandalism, apathy, and ignorance. Some have plainly given up, victims of a classroom epidemic called teacher burnout. Others are plainly incompetent, unable to cope with their problem students or teach their normal ones. Schools sometimes seem more like detention halls than groves of academe. Back talk is routine and felonious assault is more common than anyone wants to admit.[12]

Because Judge Kaufman's hope has not been realized, some Americans have begun to recognize Mill's fears of government encroachment upon liberty through education. Nationally syndicated columnist James J. Kilpatrick has recently written:

> A ... major cause of the school's decline ... is government at every level ... Government has afflicted the schools with bloat ... (L)egislative bodies have larded upon the teachers many extraneous duties ... local school boards, responding to state school boards, responding in many areas to federal grants, have imposed these obligations ...
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> The stifling influence of government and the educational establishment is not at all likely to diminish ...

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10. *Brandon v. Board of Education of the Guilderland Central School District*, 835 F.2d 971, 973 (2d Cir. 1980) *cert den.*, -- U.S –, 50 LW. 3485 (1981) [Hereinafter cited as *Brandon*.]

11. *Help! Teacher Can't Teach!*, TIME. June 18, 1980, at 54.

12. *Why Public Schools Fail*, NEWSWEEK. April 20, 1981, at 62.

> From one end of the country to another new private schools are opening their doors to fed-up families. Unless these trends can be arrested, the public schools eventually will house chiefly the poor and disadvantaged children who cannot escape to something better.
>
> Such a prospect ... is not necessarily disastrous. In a free society, no valid reason exists to accord public education a virtual monopoly upon all education.[13]

The most recent and most controversial exodus from public schools has been the withdrawal of students by Christian parents to Christian private schools. "Christian fundamentalist schools are spreading like kudzu from Atlanta to Anaheim."[14] Why? What has happened to the public school system so long supported and endorsed by moat people in the Christian community?

Christians are deserting the public schools because the courts have proliferated decisions that exclude Christianity and Christian values from "the enduring values of Western Civilization" taught in the public schools. Opinions such as that of Judge Irving Kaufman in *Brandon v. Board of Education of the Guilderland Central School District*[15] and by the United States Supreme Court in *Stone v. Graham*[16] tell the story.

In the *Brandon* case, Judge Kaufman rejected a student group's argument that a school board had denied its members' rights to free exercise of religion by refusing to allow the group to sponsor a voluntary prayer meeting in a public school classroom before the beginning of the official school day. Judge Kaufman supported this ruling by reasonlng that the Establishment Clause prohibited the school board from allowing student-initiated voluntary prayer meetings on school premises:

> "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed."[17]

Just six days before Judge Kaufman announced the decision in the *Brandon* case, the United States Supreme Court announced its *per curiam* opinion that a Kentucky statute requiring the posting of a copy of the Ten Commandments (purchased with private contributions) on the wall of each public classroom in the state violated the Establishment Clause. Without benefit of oral argument or briefs on the merits, the Court reversed the highest court of Kentucky with the following words:

> "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics comparative religion, or the like ... Posting of religious texts

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13. Kilpatrick, *Doomsday for Public Education?*, NATION'S BUSINESS. February 1980, at 14.
14. *Why Public Schools Fail*, NEWSWEEK. *Supra*, note 12 at 83.
15. *Supra*, note 10.
16. 449 U.S. 39 (1980).
17. *Brandon, supra* note 10 at 978.

on the wall serves no such educational function."[18]

The lesson of the *Brandon* and *Stone* cases is clear: The government has both the authority to determine what "the basic and fundamental values" of our society are, and the authority to teach those values to the public school student to the exclusion of other valued. The courts have determined that those values cannot include "prayer" (even though our President and many other political leaders have relied upon prayer since George Washington), nor can they include the Ten Commandments (even though those Commandments have been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States"), nor can they include any other value that judges may define as "religious."

Such religious subjects asa prayer and the Bible must be diluted and modified to meet the United Stales Supreme Court's prescription for religion in the classroom:

> "... (I)t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be aid that the Bible is worthy of study for its literary and historical qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."[19]

In other words, the Bible may *not* be taught in the public school as the revealed and infallible Word of God, but only alongside other books that have influenced the course of history or alongside the literary works of Shakespeare or other men. God has a place in the public school system so long as He is lowered to the level of a man. His Truth may be presented in the public school so long as it is indistinguishable from man's.

Moreover, even when efforts are made to translate a portion of God's truth into acceptable scientific language, Christians have often been severely criticized by educators, by mlnlatera, and by lawyers.[20] For example. recent efforts in states such as Arkansas and Louisiana to Introduce "creation science" alongside "evolutionary science" have been dismissed by many Americana as just another effort by religious fundamentalists "to introduce the Biblical version of creation into the public school curricula."[21]

Is it any wonder that Bible-believing Christians in every state of the Union have issued a Call to Arms against public education and against government control of Christian schools? Not only are they taxed to support an educational system that is designed to exclude Christian values from the "basic and fundamental values" taught In the schools, they are compelled by law to send their children to such schools or to spend their hard-earned money to finance a private school alternative

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18. *Stone v. Graham, supra* note 16, at 42.

19. *Abington School Dist v. Schempp*, 374 U.S. 203, 225 (1963).

20. *E.g.*, NEWSWEEK, Dec. 21, 1981, at 57; TIME, Dec. 21, 1981 at 87.

21. *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982). [Hereinafter cited as *McLean*.]

for their children.[22] Even if they spend the extra money, many Christians have found themselves doing battle with state education officials who, through minimum standards or accreditation laws, desire to "secularize" the Christian school.[23] Finally, they have seen more and more of their state and federal tax dollar earmarked for public schools and unavailable for private religious educational institutions.[24]

What is the answer? Many contend that Christians must work to put prayer and other religious exercises back into the public schools.[25] Some fight to get creation taught alongside evolution in the public classroom.[26] Others invest time, support, and money into efforts to grant tax credits to parents who send children to private schools.[27] Still others favor a so-called "voucher system" that would make available tax money to parents who choose private schooling.[28] Others concentrate upon protecting the private Christian school from governmental regulation.[29]

None ol these efforts will solve the problems that face Christian parents and others who are dissatisfied with modern American education unless they are built on a true foundation. In the conclusion of His sermon on the Mount, Jesus Christ warned that if a person built his life upon the Word of God, then his life would be like a house built upon a rock; it would withstand the storms of life. But if he built his life upon the teachings of men, then his life would be like a house built upon the sands; it would be destroyed by those same storms.[30]

The foundation for public education has been built upon sand because it rests upon the assumption that education is a proper function of the civil government. That is not the Biblical command; education belongs to the family, the Church, and God.[31] Moreover, government-financed and

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22. Only a few parents have been able to provide an education at home. The number of home school educators, however, appears to be increasing. According to Donna Richox, Editor of GROWING WITHOUT SCHOOLING magazine, the figure is estimated to be 10,000 children enrolled in home school programs. [*See* J. Eidsmoe, THE CHRISTIAN LEGAL ADVISOR 384 (1981) (unpublished manuscript)].

23. *See, e.g.*, A. Grover, OHIO'S TROJAN HORSE (1977).

24. *See, e.g.*, the several unsuccessful efforts by State Legislatures and Congress to subsidize private educational institutions without running afoul of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wolman v. Walter*, 433 U.S. 229 (1977); *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

25. *See, e.g.*, the Senate action on the "Helms Amendment," S. Rep. No. 450, 96th Cong., 2nd Sess. 131 (1979). Under the terms of the Helms Amendment, Federal courts would be ousted from jurisdiction in school prayer cases.

26. *McLean, supra*, note 21; *Segraves v. State of California*, (Super. Ct., Sacramento Co. No. 278978) (1981).

27. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (19730; Young, Constitutional Validity of State Aid to Pupils in Church Related Schools, 38 Ohio St. L.J. 783 (1977).

28. J.E. Coons and S.D. Sugarman, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978).

29. *See, e.g.*, the work of Mr. William Ball, a Constitutional Law expert, who has represented church groups in such well-known cases as *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Also see, Ball, *Federal Court Upholds Right of College to Teach and Advertise Without License From State Board of Education*, THE ADVOCATE, April, 1980.

30. Matthew 7:24-27.

31. See J. Whitehead, *Judicial Schizophrenia: The Family and Education in A Secular Society*, 1982 Journal of Christian Jurisprudence 49, 51; R. Rushdoony, *An Historical and Biblical View of the Family, Church, State and*

controlled education is not our constitutional legacy. Rather, public education and other government regulations of education constitute clear violations of the Firat Amendment of the Bill of Rights of the United Slates Constitution as applied to the states through the Fourteenth Amendment.

FOUNDATION FOR PUBLIC EDUCATION IN AMERICA

> "Public Education is not merely a function of government; it is of government. Power to maintain a system of public schools is an attribute of government in much the same sense as is the police power or the power to administer justice or to maintain military forces or to tax. ... The primary function of the public school, in legal theory at least, is not to confer benefits upon the individual as such, the school exists as a state institution because the very existence of civil society demands it."[32]

Thus, University of Chicago education professor Newton Edwards has summarized the legal theory underpinning public education in America: The state has the right to educate its youth in order to insure its survival. This has been the same argument utilized to support the government's efforts to set minimum standards in the private school.

Without exception, today's leading legal and education scholars have concurred with Professor Edwards. For example, University of Washington law professor Arval A. Morris has written:

> "The dominant purposes of compulsory education today are the development of good citizenship and the development of sufficient intellectual skills such that those capable of continuing on to higher education can do so; they can then supply the intellectual leadership needed for our society by becoming scholars, intellectuals, and members of the learned professions. The overall goal seems to be the development of sufficient mind and character that will enable a person to know how to live and participate effectively in American democracy."[33]

Judges, too, have uniformly affirmed that the government has the right to make good citizens out of its youth. In *McCollum v. Board of Education*, Justice Felix Frankfurter wrote that public schools had turned to "secular education" in "'recognition of the need of a democratic society to educate its children ... in an atmosphere free from pressures ... to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people ...."[34]

Justice Frankfurter's views in the *McCollum* case were not new. In 1909, the Kentucky Court of Appeals likened the education of the state's youth to the preparation of the nation's youth for war:

> "... (Public education) is regarded as an essential to the preservation of liberty - as forming

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Education, 1982 Journal of Christian Jurisprudence 21, 25.

32. N. Edwards, THE COURTS AND THE PUBLIC SCHOOLS 23-24 (3rd Ed. 1971).

33. A. Morris, THE CONSTITUTION AND AMERICAN EDUCATION 60 (2d Ed. 1980).

34. 333 U.S. 203, 216, 217 (1948).

> one of the first duties of a democratic government. The place assigned it in the deliberate judgment of the American people is scarcely second to any. If it is essentially a prerogative of sovereignly to raise troops in time of war, it is equally so to prepare each generation of youth to discharge the duties of citizenship in time of peace and war. Upon preparation of the younger generations for civic duties depends the perpetuity of this government."[35]

The Kentucky court, then analogized the authority to educate with the state's power to tax:

> The power to levy taxes is an essential attribute of the sovereignty ... So is the power to educate the youth of a state, to fit them so that the state may prosper ... It may be doubted if the state could strip itself of either quality of its sovereignty."[36]

In Kentucky, according to this opinion, a government without authority to educate would be a government without authority to tax. In other words, it would not be a government at all.

In the neighboring state of Tennessee, the judges have not been quite so expansive in their vision of the relationship between government and education, but their rationale for state education has been no less pervasive:

> "We are of opinion that the legislature ... may as well establish a uniform system of schools ... as it may establish a uniform system of criminal laws ... The object of the criminal law is, by punishment, to deter others from the commission of crimes, and thus preserve the peace, morals, good order, and well-being of society; and the object of the public school system is to prevent crime, by educating the people, and thus, by providing and securing a higher state of intelligence and morals, conserve the peace, good order, and well-being of society. The prevention of crime, and the preservation of good order and peace, is the highest exercise of the police power of the state, whether done by punishing offenders or educating the children."[37]

Survival of the state. Self-preservation of Democracy. These have been the root principles of public education. Perhaps the New Hampshire Supreme Court has summarized the legal theory best:

> "The primary purpose of the malnte nance of the common schoolsyslem is the promotion of the general intelligence of the people conaUiullng the body politic and thereby to increase the usefulness and efficiency of the citizens_ upon which the government of society depend& Free schooling furnished by the state is not so much a right granted to pupils as a duty Imposed upon them for the public good.... (T)he public schools ... are governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship."[38]

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35. *City of Louisville v. Commonwealth*, 134 Ky. 468, 121 S.W. 411, 411-412 (1909).

36. *Id.*, 121 S.W. at 412.

37. *Leeper v. State*, 103 Tenn 500, 53 S.W. 962, 968, 45 L.R.A. 117 (1899).

38. *Fogg v. Board of Education*, 75 N.H. 296, 82 A. 173, 174-175, 37 L.R.A. 1110 (1912).

It has been upon premises such as these that the American system of public education has been built. We should not be surprised, then, to find numerous statutes, regulations, policies, and rulings that license, censor, prescribe, proscribe, and otherwise determine the subject matter of what is taught fn the public school classroom and the points of view from which those subjects are taught. Nor should we be surprised that the state controls, through standards of eligibility, selection, and retention, the persons who have authority to teach in the public schools.

What authority has the government over what is taught in the public school classroom? The answer is that the government has almost total authority. It does not matter if the legislature or the State Board of Education or the local school board or the school administration, faculty, or individual teacher makes the curriculum decision, the decision maker is a governmental official. While legislatures most often delegate such curriculum matters to the state and local school board, they oftentimes do prescribe statutory guidelines.

For example, the Oregon legislature has set aside the fourth Friday in October as "Frances E. Willard Day." On that day, "time shall be set apart for instruction and appropriate activities in commemoration of the life, history, and achievements of Frances E. Willard."[39] The Oregon legislature has also required courses in the "Constitution of the United States and in the history of the United States."[40] Other subject matters legislatively prescribed are: ethics and morality, family, humane treatment of animals, and tobacco, alcohol, and drugs.[41]

Within such broad legislative prescriptions, the Oregon State Board of Education and local boards assisted by school administrators, formulate basic curriculum policies and guides within which individual teachers submit and implement their lesson plans.

Not only does the state have authority to prescribe the subject matters covered, but the government determines the point of view that must be presented. Again, legislatures delegate such matters to administrative boards or to school faculty but they sometimes fix certain uniform viewpoints. Again, the Oregon legislative policies are illustrative. For example, the last Friday in April in Oregor public schools is "Arbor Day." Students are to be taught "the benefits of the preservation and perpetuation of forests and the growing of timber and of the environment."[42] No special day is set aside for instruction in ethics and morality, but the Oregon laws require teaching "honesty, morality, courtesy, obedience to law, respect for the national flag ... respect for parents and home, the dignity and necessity of honest labor ... (and) respect for all humans, regardless of race, color, creed, national origin, religion, age, sex or handicaps."[43] Finally, the Oregon legislature "encourages" public schools to adopt a curriculum "that is nondiscriminatory by race, sex, age, *marital status*, creed, or color."[44] (Emphasis added)

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39. OR REV STAT Section 336.052 (1979).
40. OR REV STAT Section 336.057 (1979).
41. OR REV STAT Section 336.067 (1979).
42. OR REV STAT Section 336.015.
43. OR REV STAT Section 336.067 (a) and (b).
44. OR REV STAT Section 336.082.

In most states. the state board of education has authority to determine the textbooks to be selected. Only two states allow the people directly to determine curriculum matters. Parents in Massachusetts, if they meet the statutory criteria, may successfully petition to have a course taught; in Iowa, voters may direct a change in textbooks.[45] In other states, the success of a parent-initiated movement to affect the curriculum or to change textbooks depends upon the local school board.

Some parents have attempted to break this state monopoly by court action. But, without statutes like those in Massachusetts and Iowa, these efforts have almost always failed.[46] Courts usually defer to the expertise of the state educators even when the parents seek to change state education policy on constitutional grounds. For example, Christian parents in California recently sought to change the teaching of evolution as "fact" in their son's public school classroom They contended that the teaching of evolution as "fact" violated their son's free exercise of religion. The court rejected this claim because of the existence of a State Board of Education policy statement that required evolution to be taught as "theory."[47]

While the court ordered the state board to disseminate this "anti-dogmatism" policy more widely and more effectively, it did not even question the state board's "dogmatic" program that "creation science" must be excluded from the "hard science" texts and classrooms and confined to the social science texts and classrooms."[48] The message in the California public schools is clear: only "evolution" is legitimate science. The Christian parents whose tax money helps support the public schools must go elsewhere to get a point of view taught to their children more consistent with their own.

On the other hand, parents and others who endorse evolution aa the sole scientific explanation of the origins of life have recently met with success in court. In Arkansas, the state legislature enacted a law that required "equal time" for creation science and evolution in the public school science classrooms. Federal District Judge William Overton ruled this law to be an unconstitutional establishment of religion. In his opinion, he made it unmistakably clear that Arkansas must conform its educational policies to the Judge's view of what constitutes "true science":

> "(T)he essential characteristics of science are:
> (1) It is guided by natural law;
> (2) It has to be explanatory by reference to natural law;
> (3) It is testable against the empirical world;
> (4) Its conclusions are tentative, *i.e.*, are not necessarily the final word; and

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45. MASS ANN LAWS Ch 71, Section 13 (1975); IOWA CODE ANN Section 278.1 (1972).

46. *See* S. Goldstein, E.G. Lee, LAW AND PUBLIC EDUCATION 57 (2d Ed. 1980).

47. *Segraves v. State of California*, No. 278978, Slip op. at 2 (Super. Ct., Sacramento County, Calif., June 12, 1981).

48. June 19, 1981 letter of the California State Board of Education to local boards of education, school superintendents, et al. The current regulation for biology classes reads as follows:

> "The process of change through time is termed evolution. In modern biology, the Darwinian theory of evolution is the unifying theme that provides a genetic base for the past and present and changes noted through time. Philosophic and religious considerations pertaining to the origin, meaning and value of life are not within the realm of science, because they cannot be analyzed or measured by present methods of science."

(5) It is falsifiable.

"Creation science as described in Section 4(a) (of the Arkansas Act) faits to meet these essential characteristics."[49]

Does this opinion threaten the state's unchallenged authority over the classroom? No. A careful examination of Judge Overton's opinion reveals that the Arkansas education establishment opposed the Arkansas law requiring balanced treatment of creation and evolution. Moreover, it must not be forgotten that the Judge who overruled the Arkansas statute is, also, a government official. In the name of constitutional law, the Judge has assumed that he has the authority to define what is "science" and to apply that definition to determine if a point of view properly belongs in the public school classroom. While the Judge deferred this time to the scientific establishment,[50] nothing in his opinion assures the science teacher the same result next time.

Indeed, Judge Overton carefully refused to rule in favor of the academic freedom arguments made on behalf of teachers and students.[51] This ruling conforms with the prevailing norm throughout the United States. It has long been assumed that the state has authority to establish the standards of eligibility for the hiring and for the retention of public school teachers. These standards are not limited to the issues of competency and physical ability. Rather, they extend to the screening of potential teachers based upon criteria related to their political beliefs and allegiance.

This point has been most recently emphasized by the United States Supreme Court's ruling in *Ambach v. Norwick*.[52] In a series of cases before *Ambach*, the Supreme Court had reviewed several state laws discriminating against aliens in public employment. It had upheld such laws only when they were limited "to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy...."[53]

In *Ambach*, the Court upheld a New York statute that forbade any person who is not a United States citizen to be certified as a public school teacher unless that person has manifested an intent to apply for citizenship. Justice Powell wrote for the five-man majority as follows:

"... (P)ublic school teachers may be regarded as performing a task 'that goes to the heart of representative government' ...

"Within the public school system, teachers play a critical part in developing students' attitudes toward government and understanding of the role of citizens in our society. ... (T)hrough both the presentation of course materials and the example he sets, a teacher has

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49. *McLean, supra*, note 21, at 22.

50. *See, e.g.*, Lewin, *Where Is The Science In Creation Science?* 215 SCIENCE 142 (Jan. 8, 1982) and Lewin, *A Tale With Many Connections*, 215 SCIENCE 484 (Jan. 29, 1982).

51. *McLean, supra*, note 21, at p. 35.

52. 441 U.S. 68 (1979).

53. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

> an opportunity to influence the attitudes of students toward government, the political processes, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy."[54]

Moreover, Justice Powell emphasized that it did not make any difference what subject matter the teacher taught:

> "... (I)t is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system ... (A) State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught."[55]

It is true that the Supreme Court has in some cases protected people from being screened out for employment as public teachers solely for their political associations or for other political activities outside the classroom,[56] but those rulings have not hindered the government's efforts to censor the teacher in the classroom. This has been especially true at the primary and secondary levels. United States District Judge Charles Wyzanski, no enemy of civil liberties, summarized his views of state authority over the classroom teacher:

> "There are constitutional considerations of magnitude which ... might warrant a legal conclusion that the secondary school teacher's constitutional right is only to be free from discriminatory religious, racial, political and like measures ... and from state action which is unreasonable, or perhaps has not even a plausible rational basis."[57]

Among other reasons for this thin line of constitutional liberty for the teacher, Judge Wyzanski gave the following:

> "Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching 'the best that is known and thought in the world,' training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society."[58]

Even if a court sides with the teacher, it must be remembered that the teacher, himself, is a government official. That fact has recently been affirmed by the United States Supreme Court in cases applying the due process procedural protections to discipline in the public schools. Since the due process clause limits only "state action," those decisions rest necessarily on the premise that

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54. *Ambach v. Norwick, supra*, note 52, 441 U.S. at 75-76, 78, 79.

55. *Id.*, 441 U.S. at 79-80.

56. *E.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

57. *Mallioux v. Kiley*, 323 F. Supp 1387, 1392 (D. Mass. 1971).

58. *Id.*

public school teachers and administrators are acting on behalf of the state.[59] In addition, the Court most recently announced in the New York citizenship case discussed above that New York could require public school teachers to be at least bona fide active applicants for citizenship because that requirement applied "only to teachers employed by and acting as agents of the State."[60]

Whatever discretion, then, that a public school teacher has over subject matter or point of view, the decision on those matters still resides in a government agent and not in the parents or in the students or in other non-government persons.

Only one possible exception to this proposition has been suggested. In *Tinker v. Des Moines Independent Community School District*,[61] the Court struck down an effort by public authorities to discipline students who had worn black arm bands in symbolic protest against the war in Vietnam. While Justice Fortas wrote for the majority that "state operated schools may not be enclaves of totalitarianism" and that "(s)chool officials do not possess absolute authority over their students" and that "students may not be regarded as closed-circuli recipients of only that which the State chooses to communicate,"[62] the case has been consistently cited only to support the rights of students to express their views, not to support the right of public school students to influence the government's official classroom views."[63] In short, everyone has presumed that *Tinker* poses no serious threat to the government's virtual monopoly power over ideas in the public school classroom.

In summary, under the public school system at the primary, secondary, and higher levels, the government, at the local, state, and federal level and within the legislative, executive. and judicial branches, has the unmistakable and unchallengeable right to choose the subject matters and the points of view that are taught in those schools. The only real option for parents who disagree with these governmental policies or who disagree in principle that the government has authority to make such policies, is to send their children to private schools.

While private schools do offer a greater range of choice, even they are not totally free from governmental regulation. In order to meet the compulsory school attendance laws in most states, parents must send their children to schools that meet minimum standards. For example, prior to 1976, the Ohio Supreme Court found the Ohio standards to encompass the total educational program of a private Christian school:

> "(T)he content of the curriculum that is taught, the manner in which it is taught, the person or persons who teach it, the physical layout of the building in which the students are taught, the hours of instruction, and the educational policies intended to be achieved

59. See *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

60. *Ambach v. Norwick, supra*, note 52, at 76, n. 6.

61. 393 U.S. 503 (1969).

62. *Id.*, 393 U.S. at 511.

63. *See, e.g.*, J. Novak, R. Rotunda, J. Young, HANDBOOK ON CONSTITUTIONAL LAW 685 (11978).

through the instruction offered."[64]

Only by engaging in expensive and prolonged litigation were Christian parents able to escape these intrusive regulations and to vindicate their constitutional right to direct the upbringing and education of their children in free Christian schools. The Ohio Supreme Court found the Ohio standards an unconstitutional intrusion on the free exercise of religion because, in part. they would result in "the absolute suffocation of independent thought and educational policy, and the effective retardation of religious philosophy ...."[65]

Nonetheless. the Ohio Court did not rule out all state control of the educational policies of the private Christian school. Rather, it affirmed a long line of precedents as summarized by the United States Supreme Court in *Board of Education v. Allen*:

> "(A) substantial body of case law has confirmed the power of the State to insist that attendance at private schools ... be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction ... (The State) has a proper interest in the manner in which those schools perform their secular educational function."[66]

Even in the private school, then, the state has authority to dictate educational policy and, according to current case law, to intrude upon the parents' freedom of choice. Thus, Christian parents are not only required to pay taxes to support a public school system whose policies are diametrically opposed to their fundamental beliefs, but to finance a private alternative that must conform in many respects to a state educational policy with which they, also. disagree.

In summary, government control over education in America permeates the public school and extends into the private school. The same justification that is used for state-financed education has also been used for state control over private education. Again, to quote Chicago education professor, Newton Edwards: "The education of youth is a matter of such vital importance ... that the state may do much ... by way of limiting the control of the parent over the education of his child."[67]

CONSTITUTIONALITY OF PUBLIC EDUCATION IN AMERICA

A. Religion and Education in the State Constitutions

At common law, parents had authority and power to educate their children. Indeed, Sir William Blackstone in his Commentaries stated that it was the "duty of parents to their children ... (to give) them an education suitable to their station in life." While Blackstone regretted that the laws of England did little to reinforce this "natural" duty, he believed that the government's role in education was to be confined to that of punisher of the failing parent or rewarder of the successrul

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64. *State v. Whisner*, 47 Ohio St. 2d 181, 351 NE 2d 750, 770 (1976).

65. *Id.*

66. 392 U.S. 236, 245-46, 247 (1968).

67. N. Edwards, THE COURTS AND THE PUBLIC SCHOOLS, *supra*, note 32, at 24.

parent, but not as the provider in place of the parent.[68]

Nevertheless, Blackstone acknowledged that the state could punish parents whose children were sent to "any popish college" or were instructed in "the popish religion."[69] Blackstone approved such exercise of authority by the government because he approved of the government-established church in England and of Parliament's authority over speech in the realm.

In the early history of the United States, the same assumption prevailed. Churches were established and financed in almost every colony. Therefore, it should come as no surprise that the beginnings of public education in America was originally established on a "religious base" as Leo Pfeffer concluded from his reading of the preamble of the famous Massachusetts "Old Deluder Satan Act" of 1647:

> It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures ... that so at least the true sense and meaning of the original might be clouded by false glosses of saintseeming deceivers, that learning may not be buried in the graves of our fathers in the church and commonwealth, the Lord assisting our endeavors, —
>
> It is therefore ordered that every township ... of fifty householders, shall ... appoint one within their town to teach all such children as shall resort to him, to read and write, whose wages shall be paid, either by the parents or masters of such children, or by the inhabitants in general ...[70]

While many modern legal scholars cite this statute as the first "public education" law, they fall to acknowledge that the relationship between the church and state in colonial Massachusetts is very different from that today.[71]

For example, the 1641 Massachusetts Body of Liberties provided in Article 58 that the civil authority has power ... to see the peace, ordinances, and Rules of Christ observed in every church according to his word ..."[72] In fact, at the outbreak of the American Revolution, nine of the thirteen colonies had either set up or recognized or conferred special benefits upon one church to the exclusion of others. Only Rhode Island, Pennsylvania, Delaware, and New Jersey have never had established churches in this sense.[73] And only the Rhode Island charter commanded separation of church and state in such a way that the state could not tax the people to support the preaching of the Gospel and to build churches.[74]

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68. II W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 450-451 (Tucker ed. 1803).

69. *Id.*, at 451.

70. L. Pfeffer, CHURCH, STATE AND FREEDOM 323-24 (Rev. Ed. 1967).

71. *E.g.*, S. Goldstein and E.G. Lee, LAW AND PUBLIC EDUCATION, *supra*, note 46, at 1-10.

72. SOURCES OF OUR LIBERTIES 154 (R. Perry, ed. 1972).

73. A. Sutherland, CONSTITUTIONALISM IN AMERICA 264-297 (1965).

74. L. Pfeffer, CHURCH, STATE AND FREEDOM, *supra*, note 70, at 116.

After the Revolution, four of the six states in which the Anglican Church had enjoyed special privileges withdrew those benefits. Nevertheless, none of these states in the 18th century, by their constitutions, absolutely prohibited the state from financing religious activities, including the building of churches and the maintenance of pastors. Rather, those states that had addressed this "establishment" problem had adopted provisions prohibiting the state from preferring one religious sect or denomination over others. The New Jersey constitution was typical: "That there shall be no establishment of any one religious sect in this Province, in preference to another ..."[75]

Such a "no preference" clause did not prohibit a state from taxing and spending to support churches and other religious activities, as the following provision from the 1784 New Hampshire constitution demonstrates:

> As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this state have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expanse, for the support and maintenance of public protestant teachers of piety, religion, and morality:
>
> *Provided notwithstanding*, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.[76]

All that a no preference-type establishment clause accomplished was to protect a taxpayer from having to pay taxes to support any church. or school or teacher of a "persuasion, sect or denomination" with which the taxpayer disagreed.

Not only does the New Hampshire constitution prove the limited protection of the "no preference" clauses, but that document proves the close connection between the state support of the church and state support of education authorized by such state constitutions. The Massachusetts constitutional documents offer the most convincing evidence of this relationship. In the Third Article of the 1780 Massachusetts Declaration of Rights the legislature was commanded to finance and support churches and schools:

> As the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally

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75. Article XIX, N.J. Constitution (1776) reprinted in 5 W. Swindler, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 452 (1976).

76. Article VI, N.H. Constitution (1784) reprinted in *Id.*, at 345.

> diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion. and morality: Therefore, To promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.[77]

In addition, the Massachusetts legislature had authority to compel all of the people to attend "upon the instructions of the public teachers" who were to be hired by the local government bodies so long as the money paid by that person was applied to support "the public teacher or teachers of his own religious sect or denomination."[78] Thus, the same "no preference" clause that applied to the financing and support of churches was applied to the financing and support of compulsory public education.

This close link between church and state in Massachusetts led logically to the state supervision of Harvard College, because, as the drafters of the 1780 Massachusetts Frame of Government put it: "(T)he encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America ..."[79] In fact, at this time the governor was required to state, as part of his oath of office, that he believed the Christian religion.[80]

The experience in Massachusetts was typical. New Hampshire's 1784 constitution provided for state support of church and education in the same article. In those states where the constitution did not address both church and school, nonetheless, proposals to finance common schools were inevitably coupled with those designed to support churches.

For example, the 1776 Virginia Constitution contained only a "free exercise of religion"[81] clause but no provision authorizing or prohibiting the state legislature to tax and support religion. Notwithstanding the absence of such constitutional provisions, it was not until 1798 that the Virginia legislature repealed all of its laws supporting churches.

Still, the question of state-financed churches in Virginia was considered an open question. Again, that question was closely linked to the issue of state-financed schools. In an Appendix to his 1803

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77. Article III, Mass Constitution (1780) reprinted in 5 W. Swindler, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 83 (1976).

78. *Id.*

79. Ch. V, Article I, Mass Constitution (1780) reprinted in *Id.* at 105.

80. Ch. II, Article II, Mass Constitution (1780) reprinted in *Id.* at 100.

81. Section 16, Bill of Rights, VA. Constitution (1776) reprinted in 10 W. Swindler, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 50 (1976).

edition of Blackstone's Commentaries, St. George Tucker, Professor of law at the University of William and Mary and one of the Judges of the General Court of Virginia, proposed the following resolution of the church-state relations in Virginia:

> Is it not presumable that a steadfast belief, and thorough conviction of the existence of a Supreme Being; of his attributes, and his providence; of the immortality of the soul, and of a future state of conscious existence, hath, or may have a powerful effect upon the moral conduct of all who sincerely embrace and believe in those doctrines? And is it not equally presumable that the moral character of every man hath a powerful influence over his social conduct? ...
>
> Is it not probable that those who have devoted their lives to the study of the divine nature, and of the nature of moral obligation and social duty; and who feel an unfeigned conviction of their truth and importance, will be more capable of enforcing a sincere conviction and belief of them in others, than those who have not received the benefits of education or, who are compelled by imperious necessity to devote the greater part of their time to other avocations and pursuits?
>
> Is not the culture of morals, and of the social duty, an object worthy of the attention of every wise legislature?
>
> Doth any clause or article of the bill of rights or constitution of the commonwealth inhibit the legislature from imposing a reasonable tax for those purposes?
>
> If those purposes can be most effectually promoted by the employment of men of learning and ability, and of exemplary lives and conversation as teachers of the duties enjoined by religion and morality, will not a wise legislature have recourse to such means for the culture of morals, and of social duty?
>
> If the last question be answered in the affirmative, it may not be deemed improper to suggest the following skeleton of a plan for that purpose.
>
> Let the courts of the several counties within the commonwealth impose a yearly tax to be set apart and unalienably appropriated to the support of teachers of religion and morality, and for the erection and keeping in repair places of worship, and public schools ...[82]

While Tucker's proposal never became law in Virginia, his remarks offer insight into the constitutional framework within which Thomas Jefferson and James Madison opposed efforts to continue tax support for the "Christian religion." Without a clause prohibiting the establishment of religion in the Virginia Constitution, both Jefferson and Madison were forced to refer the Virginia General Assembly to the law of nature and of nature's God. They both maintained that man's mind and opinions were to be free from any civil government control through either the criminal law or "compelled contributions" because what a man believed to be true was a matter between him and

82. II W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Appendix 115-117 (Tucker ed. 1803).

almighty God to the exclusion of the State.[83]

Yet, because of the absence of an Establishment Clause, Jefferson could propose a bill to carve out for the State authority over the teaching of the basic skills of reading, writing, and arithmetic. In his 1779 Bill for the More General Diffusion of Knowledge, Jefferson spelled out the justification for tax-supported public schools, but not "religious" schools. This proposal, unlike his bill protecting religious freedom, was not adopted by the Virginia General Assembly.[84]

Jefferson's views of separating the "secular" from the "sacred" in education did not prevail in the states during the 18th and 19th centuries. Rather, state-financed and controlled public schools of the age integrated the Church and the State in a joint enterprise to exercise authority over young people's minds. Clergy often served as public school teachers, with prayer, Bible reading, and Christian values explicitly taught. No one thought such religious-oriented education to be unconstitutional because all knew that the public school system was a natural consequence of the early commitment that all religious activities, including worship and education, deserved the support of the State. This state of affairs continued in many states into the mid-19th century.

It was not until 1853 that the Massachusetts Constitution was amended to include a provision prohibiting tax support for schools operated by a religious sect. Even as late as 1919 the close link between the public school and religion in the Massachusetts constitution was not completely broken. Tax money could be used to support public and private schools so long as no "denominational doctrine is included." This section accommodating the state financing of common schools appeared inside the provision guaranteeing the free exercise of religion.[85] This coupling of public schools to the religious guarantees continued into the 20th century the symbiotic relationship that had long existed between religion and education in Massachusetts.

Indeed, the campaign for public education in Massachusetts and elsewhere was an explicitly religious crusade. Horace Mann, the commanding figure of the early public school movement, sponsored a "humanistic Unitarianism" to replace the sectarian Protestantism then taught in the Massachusetts common schools. In the preface to his 1972 biography of Mann, author Jonathan Messerli summarized his subject's position:

> What the church had been for medieval man, the public school must now become for democratic and rational man. God would be replaced by the concept of the Public Good, sin and guilt by the more positive virtues of Victorian morality and conformity. ...
>
> All of this was now possible if only reasonable men and women would join together to

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83. 2 T. Jefferson, PAPERS 545 (1950); J. Madison, A MEMORIAL AND REMONSTRANCE ON THE RELIGIOUS RIGHTS OF MAN, reprinted in BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT (Americans United for Separation of Church and State 1965).

84. CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION 81-92 (G. Lee ed. 1961).

85. Article 3, Section 2 of A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts (1919), *reprinted in* 5 W. Swindler, SOURCES, *supra*, note 77, at 126. The Harvard College provision in the original 1780 document remained unchanged. Article 153 of the 1919 Declaration, *reprinted in* 5 W. Swindler, SOURCES, *supra*, note 77, at 148.

> create a well-managed system of schooling, where educators could manipulate and control learning as effectively as the confident new breed of engineers managed the industrial processes at work in their burgeoning textile factories and iron and steel mills. For the first time in the history of western man, it seemed possible for an intellectual and moral elite to effect mass behavioral changes and bring about a new golden age of enlightened ethics, humanism, and affluence.[86]

In the latter part of the 19th century, Charles William Eliot, President of Harvard College for forty years, from 1869-1909, picked up where Mann had left off in his influential essay, "The Religious Ideal in Education," Eliot summarized the new educational religious faith as "truth, beauty, and goodness."[87] Eliot worked timelessly to implement this new faith in the public schools to replace an "outmoded" Christian faith in God.[88]

In the late 19th and 20th centuries, no one questioned if the various state constitutions allowed for this new "religion" in the public schools. Rather, the courts faced only the question whether the various state religious freedom guarantees excluded the "old religion." This question was resolved differently by state supreme courts because of the different religious freedom guarantees in the state constitutions.[89]

B. Religion and Education in the United States Constitution

It was not until 1947 that the United States Supreme Court first applied the religious guarantees of the federal Bill of Rights to the state systems of public schools. From the beginning the Court assumed that public education, as such, did not violate either the Establishment or the Free Exercise Clause of the First Amendment. While the Court has acknowledged repeatedly that public education in the states grew out of an earlier system of church-sponsored and tax-supported schools,[90] the several justices have simply assumed that the federal religious guarantees allowed for state-supported "secular" education, but not for state-supported "religious" education.[91]

Yet unlike the religious freedom guarantees of the state constitutions which evolved from a close symbiotic relation between church and state to an accommodation of the "secular" in the public school, to the exclusion of the "religious" or "sectarian," the relationship between church and state in the federal constitution was fixed in 1791. Moreover, the federal religious guarantees were quite unlike those that prevailed at the time in existing state constitutions.

On June 8, 1789, when James Madison first introduced into the House of Representatives his

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86. J. Messerli, HORACE MANN: A BIOGRAPHY XII (1972).

87. I C. W. Eliot, THE MAN AND HIS BELIEFS (W. Nellson ed. 1926).

88. H. Hawkins, BETWEEN HARVARD AND AMERICA: THE EDUCATIONAL LEADERSHIP OF C.W. ELIOT (1972); CHARLES W. ELIOT AND POPULAR EDUCATION (E. Krug, ed. 1961).

89. See 2 T. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 969-74, n. 2 (8th Ed. 1927).

90. *See, e.g.*, *McCollum v. Board of Education*, 333 U.S. 203, 213-215 (1948).

91. *See, e.g.*, *Abington School District v. Schempp*, 374 U.S. 203 (1963).

proposals that ultimately became the Bill of Rights, the religious freedom clause read as follows:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[92]

This proposal, if it had been accepted, would have limited the freedom of religion guarantee to "belief or worship" and the establishment guarantee to a prohibition against a "national religion." These were, after all, comparable to the religious guarantees in several of the existing state constitutions. But Madison's proposals were modified by language that differed significantly from the texts then prevailing in the state documents. His "free exercise" proposal was extended beyond "belief or worship" to "religion" and the establishment proposal was extended beyond "national religion" to "religion."

These changes were not accidental ones; rather, they came as a result of deliberate attempts to oust the new federal government from exercising any jurisdiction whatsoever in matters of "religion." James Madison had included the adjective, "national" because he initially proposed only to prohibit a national religious policy that allowed "one sect ... (to) obtain a pre-eminence, or two (to) combine together, and establish a religion to which they would compel others to conform."[93] Under such a provision. the federal government could have enacted non-preferential statutes governing religion.

Others disagreed with this narrow purpose. While some expressed fear of an absolute division of church and government jurisdiction, these representatives urged the dropping of the word, "national," in order to ensure that "no religious doctrine ... be established by law."[94] The reason for this refusal to adopt a "no preference-type establishment prohibition" and to enact a broad prohibition against any national religious policy came from Mr. Gerry of Massachusetts. He insisted that the latter prohibition was the one called for by those who had opposed ratification of the Constitution without amendments and that the amendments, therefore, ought to be responsive to those who opposed the creation of a "national" as contrasted with a "federal" government.[95] In short, the national government should have no authority at all over religion.

Those who successfully opposed a national unified policy on religion, even though fair to all religious persuasions, also successfully expanded the right of free exercise to include all religious activities. not just "belief and worship." At first, the House supported the broad prohibition on laws "infringing the rights of conscience" as proposed by Madison. Some in the House opposed this language because it would "patronize those who professed no religion at all."[96] Later, the Senate met this concern by excising the "conscience clause" and by expanding the "free exercise" clause

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92. SOURCES OF OUR LIBERTIES 422 (R. Perry ed. 1972).

93. M. Malbin, RELIGION AND POLITICS 9 (1978). [Hereinafter cited as MALBIN].

94. Statement of Mr. Gerry, 1 Annals of Congress 730 (Aug. 15, 1789), quoted in II B. Schwartz, THE BILL OF RIGHTS 1088 (1971). [Hereinafter cited as SCHWARTZ].

95. *Id.*, II SCHWARTZ, at 1089.

96. *Id.*

beyond "belief and worship" to "religion."[97]

The word, "religion," in both the establishment and free exercise clauses was intended to separate the whole jurisdiction of the church from that of the federal government. That was the understanding of Thomas Jefferson when he gave his second inaugural address as President:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it, but have left them, as the constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies."[98]

Again, in 1808, Jefferson wrote:

> I consider the Government of the United States as interdicted by the Constitution from inter-meddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserved to the States the powers not delegated to the United States. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States. as far as it can be in any human authority."[99]

As these excerpts from Jefferson's writings indicate, the federal jurisdictional wall separating church and state at first did not affect the states.[100]

Not until the United States Supreme Court construed the 14th Amendment to place the states under the First Amendment religious guarantees, however, was each state held to the jurisdictional wall of separation erected in the United States Constitution.[101] Yet, the Court has never even paused to ask if this change in constitutional jurisprudence should occasion a re-examination of the role that the states had been playing in education, even though that role had been predominantly shaped by a close relationship between church and state. Instead as previously noted, the Justices, without exception, have assumed that the federal religious guarantees made the same accommodation

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97. MALBIN, *supra*, note 92, at 13.

98. 8 T. Jefferson, WORKS 42 (H. Washington, ed. 1884).

99. 5 T. Jefferson, WORKS 236-37 (H. Washington, ed. 1884). This appears in a letter written to a Rev. Mr. Miller in defense of Jefferson's refusal to proclaim a national day of fasting and prayer.

> "Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

100. *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 609 (1845).

101. It is beyond the scope of this paper to discuss the continuing controversy over the Court's use of the 14th Amendment to impose most of the federal Bill of Rights on the states. See, however, R. Berger, GOVERNMENT BY JUDICIARY (1977) and J. Whitehead, THE SEPARATION ILLUSION (1977).

between the church and state as had the several state constitutions. That assumption is clearly incorrect

More important, since the 1930's and 1940's, when the Court began to apply the Establishment and the Free Exercise Clauses to the states, the Court has developed rules of law governing the religious freedom cases that are not designed to draw a jurisdictional line between church and state. Rather, its tests are designed to define religion as a subject matter.

The Court's early efforts to apply the Establishment Clause to public education spawned the later constitutional ban on Bible and prayer in the public schools and gave birth to the current familiar language of the three-part establishment clause test:

> First. the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster an excessive government entanglement with religion.[102]

The key words in this three-part test are "secular" and "religion." In the public school cases, the Court has separated the "secular" from the "religious" without ever defining the meaning of the terms. The Kentucky Ten Commandments case has been typical:

> "The Commandments do not confine themselves to arguably secular matters, such aa honoring one's parents, killing or murder, adultery, stealing, false witness. and covetousness ... Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain. and observing the Sabbath Day."[103]

How can the Court divide the Ten Commandments, an admittedly "sacred' text into two categories, one religious and one non-religious? A careful search of the Establishment Clause cases has revealed no answer. In a few of the Free Exercise and related cases, the courts have attempted to define religion with such tests as "man's ultimate concerns," or "comprehensive truth," or belief parallel to faith in God.[104] Surely, if one part of the Ten Commandments would qualify as religious under such definitions, so would the other. Yet, the courts have not consistently applied these Free Exercise definitions to the Establishment Clause in public education cases. No better example is available to prove this point than the current controversy over the teaching of "creation science" in the public school classroom.

There has been no more comprehensive truth, ultimate concern, or belief parallel to faith in God than that of "evolutionary science" in today's public school classroom. The so-called "principle of evolution" permeates every discipline as the recently published American Humanist Association's "Statement Affirming Evolution as a Principle of Science" has explained:

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102. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted).

103. *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).

104. *Malnak v. Yogi*, 592 F.2d 197, 207-210 (3d Cir. 1979) (concurring opinion).

> For many years it has been well established scientifically that all forms of life, including human beings, have developed by a lengthy process of evolution. It is also verifiable today that very primitive forms of life, ancestral to all living forms, came into being thousands of millions of years ago. They constituted the trunk of a 'tree of life' that is growing, branched more and more .... Humans and the other highly organized types of today constitute the present twig-end of that tree....
>
> There are no alternative theories to the principle of evolution, with its 'tree of life' pattern, that any competent biologist of today takes seriously. Moreover, the principle is so important for an understanding of the world we live in and of ourselves that the public in general, including students taking biology in school, should be made aware of it, and of the fact that it is firmly established in the view of the modern scientific community ...."[105]

Despite statements as this one, the principle of evolution, unlike the principle of creation, has escaped being labeled "religious." Why? A diligent search through the cases has uncovered but one significant clue, namely, Mr. Justice Stevens' concurring and dissenting opinion in *Wolman v. Walter*:

> The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the *Scopes* case: 'The realm of religion ... is where knowledge leaves off, and where faith begins. ...'"[106]

This definitional dichotomy was explicitly adopted by United States District Judge William Overton in the recent test case of the Arkansas "Balanced Treatment for Creation-Science and Evolution-Science Act."[107] In that case the judge concluded that "creation science" was "religious" because it did not within his five-point definition of "science."[108] Central to Judge Overton's ruling that "creation science" was not a science was that its basic premise was not verifiable by the "empirical method":

> Creation science ... asserts a sudden creation 'from nothing'. Such a concept is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, is not testable and is not falsifiable.[109]

In short, Judge Overton has adopted a late 19th- and 20th-century world-view that separates "science" and "empirical truth" from "faith" and "revealed truth." The former is "secular" and the latter is "religion." Is it any wonder, then, that the followers of the Guru Maharishi Mahesh Yogi have labeled "transcendental meditation" the science of creative intelligence, and that the followers

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105. American Humanist Association, Statement Affirming Evolution as a Principle of Science (1980) (Available in pamphlet form from the Association's headquarters, 7 Harwood Drive, Amherst, NY 14226).

106. 433 U.S. 229, 264 (1977).

107. *McLean*, *supra*, note 21, at 1.

108. *Id.* at 22.

109. *Id.*

of Christ[110] have labeled the Genesis account of creation "scientific creationism"? Without the scientific label no subject may be taught as true in today's public school classroom. Even so, such efforts may fall if the proponents are unable to convince a judge that they are advocating "true science."

Today's legal scholars also assume that the issues under the Establishment and Free Exercise Clauses are subject matter definition ones. Yet, they, too, have not offered any better guidelines than those offered by the courts. In his widely acclaimed book, American Constitutional Law, Harvard Professor Laurence Tribe suggests two different definitions of religion for the two clauses in order to accommodate the "dramatic changes" that have taken place in American society since 1789.[111] Although unclear, Professor Tribe's definitional distinctions between that which is "arguably religious" from that which is "arguably non-religious" presupposes a world-view that divides the "mind" from the "spirit." This dualism is best illustrated by his proposed analysis of the constitutionality of teaching transcendental meditation in the public schools:

> The TM course trains students in a method or process of meditation. For some, it is a religion; but for thousands of people throughout the country it is a mental exercise, often engaged in by enthusiastic adherents of such formal religions as Christianity, Judaism, and Mohammedanism.[112]

But the true constitutional question should not turn on Clarence Darrow's, Judge Overton's, Professor Tribe's, or any other modern thinker's dualistic world-view. Rather, it ought to be resolved by an attempt to understand what the First Congress meant when they put the religious freedom clauses into the Constitution in 1791. A careful examination of the legislative history reveals that the members of Congress chose the word. "religion," not to separate one kind of subject matter from another, as if engaged in an academic enterprise or in the writing of a dictionary. Rather, they used the word, "religion," to settle a longstanding political conflict over jurisdiction between the civil government, the church, God, and man.

The early drafts of the free exercise of religion clauses that were adopted in the several state constitutions during and after the American Revolution explicitly recognized this jurisdictional purpose. For example,. Section 16 of the June 12, 1776, Virginia Bill of Rights read, as follows:

> That religion, *or the duly which we owe to our Creator, and the manner of discharging it*, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience ..."[113] (Emphasis added.)

The First Congress rested its support for the religious freedom guarantees in the federal Bill of

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110. See *Malnak v. Yogi, supra*, note 104.

111. L. Tribe, AMERICAN CONSTITUTIONAL LAW 826-833 (1978).

112. *Id.* at 828.

113. Constitution of Virginia, Section 16 (1776), *reprinted in* SOURCES OF OUR LIBERTIES 312 (R. Perry, ed. 1972).

Rights on this very provision in the Virginia Constitution. The word, "religion," was understood as a shorthand way of describing all those affairs that belonged exclusively to God. Other early state constitutions spelled out these non-State enforceable duties.[114] The underlying principle was clear. Only those activities that were amenable to the coercive power of the state were "non-religious" and, therefore, subject to the state's jurisdiction.[115] Those activities that were not amenable to "force or violence" belonged to God and, therefore, were outside the state's jurisdiction.[116] The Establishment Clause extended this Free Exercise principle to preclude the new federal government from taxing and subsidizing activities that had already been constitutionally identified as outside the "coercive" power of most of the several states.

America's early constitutional authorities understood this jurisdictional purpose quite well. James Madison's famous "Memorial and Remonstrance on the Religious Rights of Man"[117] was written in opposition to a Virginia law that would have financed "teachers of the Christian religion." Madison did not object to this proposal because the subject matter to be taught was Christian. Rather, he argued that "the opinions of men, depending only upon the evidence contemplated in their own minds, cannot follow the dictates of other men ..." What a man believed and, therefore, what he was taught was "a right towards men ... (because it was) a duty toward the Creator." This right was unalienable because:

> (T)he duty of every man to render the Creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time and degree of obligation, to the claims of civil society.

Madison, then, continued to explain the jurisdictional argument, as follows:

> Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe, and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society do it *with the saving allegiance to the universal sovereign*. (Emphasis added)

According to Madison. the "civil magistrate," *i.e.*, the state tax supported teacher, had no authority to "judge the truth," because that was assigned by the law of nature to God alone.

Jefferson's views echoed those of Madison's. In 1779, Jefferson introduced An Act for Establishing Religious Freedom[118] in the Virginia General Assembly with these remarkable words:

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114. Constitution of Pennsylvania, Section II (1776), *reprinted in Id.* at 329.

115. *See* Romans 13:4(b), "... (The civil government) is the minister of God, a revenger to execute wrath upon him that doeth evil."

116. *See* Acts 5:28-29, "... Did we not straitly command you that ye should not teach in this name? ... Then Peter and the other Apostles answered and said, We ought to obey God rather than men."

117. BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT (Americans United for Separation of Church and State) 7-14 (1965).

118. T. Jefferson, PAPERS 545 (1950). Unfortunately, Jefferson did not act consistently with this statement of principle.

> Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, ... are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, ... who, ... have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; ...

From these early documents we may draw two incontestable conclusions. First, our constitutional forefathers used the word, "religion," to denote those affairs outside the jurisdiction of civil government. Second, they understood that "the law of nature and of nature's God" determined which affairs belonged under the civil government and which belonged to the sovereign Creator of the universe.

Modern courts and legal scholars have respected neither of these objectives. Moreover, they have never given an adequate definition of religion in subject matter terms. Indeed, that has proved to be an intractable problem. Nor have they been able to define "religion" in such a way to ensure government "neutrality" about religious values in ita laws. Both courts and scholars have found it impossible to extract the religious element from law.

Examples from court opinions abound. After the United States Supreme Court upheld the Sunday Closing Laws, it summarily approved a Kentucky law that exempted Sabbatarians from the Sunday laws in that state,[119] even though they had previously denied a Sabbatarian's claim that such an exemption was required by the Free Exercise Clause.[120] Likewise, the Court has approved Congressional endorsement of conscientious religious objection to all wars to the exclusion of such objection to "unjust" wars in the selective service law.[121] Yet, the Court has strongly suggested that the Free Exercise Clause would not require Congress to afford any religious conscientious objection exemption.[122] The point is a simple one: both the state and the United States legislatures may embrace a policy based upon a preference for or against a particular religious belief without running afoul of the Constitution. Such a policy may be "neutral in the sense of the Establishment Clause,"[123] but it is not neutral in the sense that it endorses no religious value.

Most recently the Supreme Court has affirmed this point when it rejected the Establishment Clause claim that the Hyde Amendment, which limits federal funding for abortions according to the

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See text, *supra*, note 84.

119. *Arlan's Department Store v. Kentucky*, 371 U.S. 218 (1962).

120. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

121. *Gillette v. United States*, 401 U.S. 437 (1971).

122. *Id.* at 461-462.

123. *Id.* at 453.

standards of the Roman Catholic faith, was unconstitutional.[124] Professor Tribe had made a similar argument in support of the Court's opinion in *Roe v. Wade*,[125] but he later admitted his error:

> Suggestions have been advanced that the interest in fetal life is intrinsically religious, or at least that the inescapable involvement of religious groups in the debate over abortion rendered the subject inappropriate for political resolution and hence proper only for decision by the woman herself. But, on reflection, that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question. (Footnotes omitted.)[126]

Not only is it impossible to chart a course of "religious neutrality" in government affairs, it was never the intention of the drafters of the Constitution to chart such a "neutral" course. Joseph Story stated that truth with unmistakable clarity in his famous Commentaries:

> ... (T)he right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion. and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice.[127]

The question for Story, as it was for Madison and Jefferson, was one of power or authority - not one of neutrality. While Story may have disagreed with Jefferson over where to draw the jurisdictional line, he never doubted that the law that was appropriately within the authority of the civil government embodied religious values:

> One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the Common Law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines. ... There has never been a period in which the Common Law did not recognize Christianity as lying at its foundations.[128]

According to Story, the "error" of the Common Law that was to be rectified by the constitutional religious freedom guarantees was one of jurisdiction:

> It (the Common Law) tolerated nothing but Christianity ... and with unrelenting severity consigned the conscientious heretic to the stake ... Thus, justice was debased ... by calling in the aid of the secular power to enforce that conformity of belief, whose rewards and

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124. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

125. 410 U.S. 113 (1973).

126. L. Tribe, AMERICAN CONSTITUTIONAL LAW, *supra*, note 110, at 928.

127. II J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 628 (5th ed. 1891).

128. Story, "Discourse Pronounced Upon the Inauguration of the Author As Dane Professor of Law in Harvard University, August 25th, 1829," *reprinted in* THE LEGAL MIND IN AMERICA 178 (P. Miller, ed. 1982).

punishments belong exclusively to God.[129]

In the 19th century, the United States Supreme Court followed Story, Jefferson and Madison. In *Reynolds v. United States*, for example. the Court recognized explicitly that the free exercise clause raised. fundamentally, a jurisdictional question:

> ... (T)here never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guarantee of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law.[130]

Unfortunately, the Court has not followed this early approach in its later decisions. Instead, it has eschewed absolute demarcations of jurisdiction between church and state for an ad hoc balancing technique based upon the Court's assessment of a "compelling state interest." For example. Amish parents have successfully kept their children out of school after the eighth grade, whereas an Amish employer has failed to keep his employees out of the social security system. Why? Because the Court believed that the survival of the social security system depended upon the allowance of no exceptions other than those legislatively prescribed whereas the public school system, and the society it serves, would survive a few Amish dropouts.[131]

Not only has the Court failed in the free exercise cases, it has also overlooked the historic jurisdictional purpose of the Establishment Clause. It has never examined any public school or other public financing of education case under the Establishment Clause as a question of jurisdiction. Rather, it has accepted without question the premise that the state has jurisdiction to educate. As a result, the Court has attempted to keep the state "neutral" about "religion" in its educational enterprise.

This so-called doctrine of "neutrality" is leading the courts and school administrators to excise one by one whatever remains of this country's Christian heritage in the public school. While the Supreme Court has warned against the establishment of the religion of "secular humanism,"[132] it has led the way to the ascendancy of the Humanist Manifesto as the official faith in public schools.

The truth is that one cannot be neutral about God in education. Either the fear of the Lord is openly acknowledged as the beginning of knowledge, as the writer of Proverbs has said,[133] or He is not. If God cannot be mentioned as the source of knowledge - and He cannot under current Court findings

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129. *Id.* at 178-179.

130. 96 U.S. 145, 165 (1879).

131. Contrast *Wisconsin v. Yoder*, 406 U.S. 205, 221-229 (1972) with *U.S. v. Lee*, 455 U.S. 252, 50 L.W. 4201, 4203-4204 (1982).

132. *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

133. Proverbs 1:7.

- then the Christian philosophy of truth is excluded daily from every public school classroom in this nation. That state of affairs is certainly not "neutral."

But the answer is not to put God back into public education or to give Him equal time or to camouflage His truth as "science." Rather, the answer is to be found in an examination of the premise upon which all government aid to education rests - namely, that the government has jurisdiction to educate.

The opinions of man, his beliefs and thoughts, were affairs that Madison, Jefferson and others believed to belong to God, not man. Because education is designed to shape those opinions, it is clearly outside the jurisdiction of civil governments. That is the teaching of God's word and, therefore, is commanded by the law of nature and of nature's God as that term was understood by the drafters of our Declaration of Independence.

The First United States Congress recognized this truth when it enacted Article Ill of the 1787 Northwest Ordinance:

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[134]

Even before the Bill of Rights, Congress knew that religion and education were inseparable and that the government could encourage, but not establish an educational system.

We have departed from these two principles in the public education system in America. The Supreme Court should return to the historic purpose of the establishment and free exercise clauses and find the public school systems of this land as unconstitutional establishments of religion and interferences with free exercise of religion as the drafters of the First Amendment originally intended.

C. Speech, Press, and Education in the United States Constitution

But the question of the constitutionality of public education is not limited to the religious guarantees. Rather, taxing, supporting, and operating systems of public schools also transgress the First Amendment's free speech and press clauses. Unlike the argument that government financing of education violates religious freedom, the argument that the public school system violates the free speech and press clause fits more easily into the prevailing views about those constitutional guarantees.

While there has been, and continues to be, controversy over the historic purposes of the free speech and press clauses of the United States Constitution, there is near unanimity that their purposes relate to two oppressive practices sanctioned by the common law in England at the time of, or in the century before, the American Revolution and by the licensing, taxing, and subsidization programs that governed the press in 17th- and early 18th-century England.

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134. Northwest Ordinance, Art. III, *reprinted in* SOURCES OF OUR LIBERTIES 396 (R. Perry, ed. 1972).

First, the Free Speech and related clauses, including the treason clause of Article III, Section 3, Clause 1, prohibit the government from enacting and enforcing the common law of "constructive treason," namely, a law the purpose of which is to prohibit a person from "compassing or imagining the death of the government." Thus Justice Stevens recently wrote with confidence in his majority opinion in *Young v. American Mini Theaters, Inc.*:

> A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate he said: 'I disapprove of what you say, but I will defend to the death your right to say it.' The essence of that comment has been repeated time after time invalidating attempts by the government to impose selective controls upon the dissemination of ideas.[135]

Second, the Free Speech and related clauses prohibit the government from enacting the common law of seditious libel, namely, a law that protects the government's reputation. Thus, Justice Brennan wrote for the majority in *New York Times v. Sullivan*:

> For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.[136]

Third, the Free Speech and Press clauses prohibit the government from enacting a licensing scheme comparable to that prevailing in England to suppress some opinions and to favor others solely because of the government's agreement or disagreement with their content. Thus, Justice Thurgood Marshall wrote for the majority in *Police Department of Chicago v. Mosley*:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content ...
>
> Necessarily, then, ... government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.[137]

Moreover, these clauses were designed to prohibit the state from limiting access to First Amendment private forums by taxation. Thus, Mr. Justice George Sutherland wrote for the majority in *Grosjean v. American Press Co.*:

> ... (T)axes (of newspapers) constituted one of the factors that aroused the American colonists to protest against ... the home government; ... the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

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135. 427 U.S. 50, 63 (1978).

136. 376 U.S. 254, 291 (1964).

137. 408 U.S. 92, 95-96 (1972).

> These duties were quite commonly characterized as 'taxes on knowledge,' ... (and) had, and were intended to have, the effect of curtailing the circulation of newspapers ...
>
> ... (T)he dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect to their governmental affairs. ... (T)he aim of the struggle (against these taxes in England and America) was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government ...
>
> In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all newspapers and magazines. ... (The tax) met with such violent opposition that ... (it) was repealed in 1788 ...
>
> The framers of the First Amendment were familiar with the English struggle ... and the then recent Massachusetts episode.... It is ... impossible to believe that it (the Amendment) was not intended to bring within reach of these words (freedom of press) such modes of restraint as a (licensure tax on newspapers)....[138]

Finally, the drafters of the United States Constitution carefully avoided sanctioning government subsidization of speech and press when it drafted Article I, Section 8, Clause 8 of the United States Constitution:

> The Congress shall have Power ... to promote the Progress of Science and Useful Arts, by securing for limited times to Authors and inventors the exclusive Right to their respective Writings and Discoveries.

This is the only grant of power to Congress with a statement limiting the means of exercise of that power. The drafters deliberately chose language to exclude any possibility that this grant authorized Congress to "subsidize" the sciences and the useful arts and thereby to repeat the 18th-century English experience where the government subsidized with tax revenues favored authors and artists.[139] The word "securing" was sufficient insurance that the copyright law of the early part of the 18th century was to be within the jurisdiction of the new federal government, but not the efforts of the English government to substitute a system of taxation and subsidization for that of licensing in order to control the press by promoting the opinions that it desired.

What is remarkable about the system of public education in light of this summary is that it rests upon a policy that contradicts each of the two fundamental free speech principles and that it utilizes each of the three forbidden techniques of controlling speech and press, namely, licensing, taxing, and subsidization.

The justification for the public school system that has been given by all legal scholars and judges

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138. 297 U.S. 233, 246, 247, 248 (1936).

139. See F. Siebert, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, 323-45 (1952).

is this: To ensure that the State's young people are educated to become good citizens.[140] Thus. Chicago education professor, Newton Edwards, has stated that "(t)he state ... can prohibit the teaching if doctrines which challenge the existence of the state and the well being of society."[141] State legislatures and boards of education have consistently adopted laws and regulations that require certain points of view to be taught to the exclusion of others.

The underlying assumption of public education is that the government has authority to control the thoughts and the minds of its youth. This is not a phenomenon of 20th-century Big Brotherism, but, rather, it was built into the very foundation of public education by its first and foremost proponent, Horace Mann:

> As for public control, it was at the very center of the common school idea ... Public control - through the legislatures, the Board of Education, local school committees, and other civil agencies - was the means by which the public could participate in defining the *public philosophy* taught its children.[142] (Emphasis added.)

With the ultimate purpose of government control lying at its very foundation, no system of public education should be able to withstand constitutional scrutiny under Court standards such as the following:

> ... (A government) may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[143]

The United States Supreme Court has recently held that the public school classroom is a public forum available for free speech activities. In *Tinker v. Des Moines School Dist*., Justice Fortas concluded for the majority that the public school official could not enforce a policy that singled out for prohibition the expression "of one particular opinion" when other opinions were allowed. While Justice Fortas acknowledged that bona fide discipline and other "time, place, and manner" policies were constitutional, those legitimate concerns did not include "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[144]

According to *Tinker*, the school officials have "comprehensive authority ... to prescribe and control

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140. See text at notes 32-38 *supra*.

141. N. Edwards, THE COURTS AND THE PUBLIC SCHOOLS, *supra* note 32, at 24.

142. Cremin, "Horace Mann's Legacy," in THE REPUBLIC AND THE SCHOOL 19-20 (L. Cremin, ed. 1957).

143. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

144. 393 U.S. 503, 509 (1969).

conduct in the schools," but not the subject matter or points of view presented in the classroom.[145] Even Justice Harlan, in dissent, argued that it would be illegitimate for a school official purposefully to "prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[146]

But Justice Fortas' majority opinion was even more forceful:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our constitution. ... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.[147]

In the public classrooms across America government officials prescribe the subject matters taught and the points of view taught, they select the textbooks and the teachers both with an eye to the content and to the philosophy presented. Public education is designed to "foster a homogeneous people," the very thing that Justice McReynolds repudiated as permissible in the case of *Meyer v. Nebraska*.[148] While the Court in *Meyer* expressly noted that no challenge of the State's power to prescribe a curriculum for institutions which it supports had been made, it affirmed a principle that could be easily applied to dismantle the public education system as it is currently operated.

One might argue that the answer to these constitutional objections is to require that all points of view be presented in the public school classroom or that "content" and other impermissible discriminatory standards be prohibited in the operation of the public schools. That would, perhaps, be the conventional response. For example, Mr. Justice Douglas has suggested that the Corporation for Public Broadcasting, a federal government agency, should be required to afford equal time to all points of view and all constitutionally protected subject matters.[149] This view was most recently endorsed by four dissenting Justices in *Lehman v. Shaker Heights*[150] when Justice Brennan argued that a city-owned bus could not afford advertising space for the League of Women Voters and deny that apace to a candidate for public office.

If *Tinker* has established that the public school classroom is a First Amendment forum, is the constitutionally mandated equal time solution, as suggested by Justices Douglas and Brennan, the answer to the free speech problem posed by current government policies discriminating on the basis of content and point of view? Public educators would promptly oppose that proposition as unworkable and chaotic. No public school system could possibly function under such a

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145. *Id.* at 507.

146. *Id.* at 528.

147. *Id.* at 511.

148. 262 U.S. 390, 402 (1923).

149. *C.B.S. v. Demo Nat. Comm.*, 412 U.S. 94, 149-50 (1973) (Douglas concurring).

150. 418 U.S. 298, 315-322 (1974). The majority rejected this argument only because they found that the city bus was not a "First Amendment forum." *Id.*, at 304.

constitutionally required order. Rather, their attorneys would argue that the Government has complete editorial control over the subjects and points of view *officially* presented in the classroom. In support of this proposition they might rely on Justice Douglas' suggestion in his concurring opinion in *Lehman v. Shaker Heights* that the city-owned bus in that case was more akin to a city-owned newspaper and that, as owner, the city had the same right to deny access - to the bus for political advertisements as did the Miami Herald to deny access to its newspaper to a political candidate whose views the newspaper publisher and editor opposed.[151]

In effect, the Government's position would be that their authority over public school educational policy is commensurate with the authority of the owners of private schools. Hence, they would contend that their First Amendment rights are the same, namely, to dictate what is to be taught, and how it is to be taught.

This argument, if accepted, would turn the free speech clause on its head. That clause is a limitation on the power of government, not a grant of power to government. Moreover, the free press clause specifically prohibits any government program of licensing, taxation, and subsidization of a First Amendment forum, the sole purpose of which is to present or to teach certain subjects and points of view favored by the government.

Like the religious clauses in that Amendment, the Press Clause, to be properly understood, must be interpreted in light of the history of the adoption of the Bill of Rights. Before the ratification of the first Ten Amendments, Congress had authority under Article I, Section 8, Clause 8 to promote science and the useful arts by enacting copyright and patent laws. Under either the taxing and spending clause or the necessary and proper clause, Congress might supplement those laws by taxing and spending programs or other acts for the same purpose.

One of the leaders in the struggle for the Bill of Rights, Richard Henry Lee, believed that the "general welfare" clause threatened the freedom of the press. In his *Letters from the Federal Farmer*, Lee wrote the following:

> ... (I) am not clear that Congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed ... should the printer say, the freedom of the press was secured by the Constitution of the state in which he lived, Congress might, and perhaps, with great propriety, answer, that the federal constitution is the only compact existing between them and the people....[152]

While Alexander Hamilton attempted to refute Lee's contention in Federalist Paper Number 84, his views did not prevail. James Madison's original proposals triggering the first Ten Amendments included the following:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments: and the freedom of the press, as one of the bulwarks of liberty, shall be

151. *Id.*, at 306.

152. I SCHWARTZ, *supra*, note 94, at 474.

> inviolable.[153]

The House committee report, while bringing the language more in conformity with the text of the First Amendment, reaffirmed the Madisonian principle "that these rights belonged to the people."[154]

At the heart of the constitutional free press guarantee, then, is that the government has no jurisdiction to tax the press as press, to subsidize the press with tax revenue, or to enter the press business, itself. The right to own and operate the press is outside the jurisdiction of the government. To establish a Washington, D.C., version of PRAVDA would encroach upon the exclusive right of the people to engage in journalism.

But the right of free press is not a special privilege held only by newspapers and other traditional media enterprises. Rather, the press principle extends to the amateur pamphleteer, the private school, and even to the ordinary homeowner.

That principle grants exclusive jurisdiction over access to those private First Amendment Forums to their owners or occupiers. Thus, the United States Supreme Court has observed in *Miami Herald v. Tornillo*:

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.
>
> ... Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case ...
>
> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida (right to reply) statute falls to clear the barriers of the First Amendment because of its intrusion into the function of editors.[155]

Likewise, the Supreme Court has held in a long line of cases that the government cannot intrude upon the homeowner's function as editor of what he will hear at the door of his home. That principle has been recently affirmed in Justice White's majority opinion in *Village of Schaumburg v. Citizens for a Better Environment*.[156] As Justice Black wrote tor the majority of the Court in *Martin v. Struthers*:

> The right of freedom of speech and press has broad scope .... This freedom embraces the right to distribute literature ... and necessarily protects the right to receive it ...
>
> ...(This) ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual

153. II SCHWARTZ, *supra*, note 94, at 1026.

154. *Id.*, at 1090.

155. 418 U.S. 241, 256, 258 (1974).

156. 444 U.S. 620 (1980).

> householder....
>
> ... The National Institute of Municipal Law Officers has proposed a form of regulation... which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs - with the homeowner himself.[157]

What of the parent's function to educate his children, a constitutionally recognized right in a long line of cases beginning with *Meyer v. Nebraska*? May that function be assumed by the government so that instead of a parent's making the decisions about subject matter and point of view, the government does? Does the right of parents to send their children to private schools adequately meet the constitutional standards under the Press principle of the First Amendment? I think that the answer is "No."

May the government use its taxing and spending power to subsidize competing newspapers, pamphlets, schools, and other such enclaves to counter the views expressed in those private forums? To allow the government to do so would be to ignore history.

After all in the early 18th century, after the English government failed to control the views of political dissidents by its licensing system, it turned to a taxing and subsidization scheme to promote those who favored views compatible with those of the government.[158] Surely the free press clause was designed to halt the repetition of that despised practice.

Today, the federal, state, and local governments tax the people to license teachers and schools, to sponsor research, to aid public and private schools, and to support other educational programs to promote the views of these governments on subject matters ranging from politics to science. Since education is clearly a free speech activity, all such programs unconstitutionally usurp the right of the people to choose freely the educational programs that they desire to support financially.

Just recently, the United States Supreme Court faced a similar issue in *Abood v. Detroit Board of Education*. Striking down a Michigan statute that required its public teachers to contribute to a teacher union's political activities, the Court observed:

> The fact that the ... (teachers) are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.[159]

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157. 319 U.S. 141, 143, 143-144, 148 (1943).

158. E. Barrett and W. Cohen, CONSTITUTIONAL LAW 1105-1108 (6th ed. 1981).

159. 431 U.S. 209, 234-35 (1977).

CONCLUSION

In summary, government support of education at the federal, state, and local levels is unconstitutional. Education is an unalienable right of the people and, consequently, it is a duty owed to the Creator, not the state. Both the Establishment and the Free Exercise clauses preclude the civil government from exercising jurisdiction over the education of the people. Moreover, public education fails every free speech and press rule and violates the right of the people to be free from taxes that support any government-run program that is designed solely to support the government's views.

Taking these contentions seriously, even if one is sympathetic to them, may appear, upon initial consideration, unthinkable. Would a court seriously entertain a lawsuit to dismantle the government-supported schools that exist in every community in this nation? Before shrinking back from the enormous odds against a successful challenge to the public education establishment, one ought first to consider the impact of a well-documented Brandeis brief cataloging the violence, the failures, the disobedience, the waste, and the frustrations that are the everyday experience of taxpayers, parents, students, teachers, and administrators in public schools across the nation.

Moreover, one ought to take courage to do what is right, regardless of the prospects of success. One of the great Old Testament prophets, Samuel, must have had second thoughts when he first challenged King Saul's authority to make the offerings to God before going into battle against the Philistines. Alter all, what match was Samuel against Saul? Yet, Samuel did not fail in the task that God had assigned him:

> Thou has done foolishly: thou hast not kept the commandment of the Lord thy God, which he commanded thee: for now would the Lord have established thy kingdom upon Israel forever. But now thy kingdom shall not continue: the Lord hath sought him a man after his own heart ... because thou hast not kept that which the Lord commanded thee.[160]

Because Samuel dared to do right, King Saul lost his kingship and David became king. The time has come to challenge the illegitimate government-financed and operated schools and return education to its rightful place - to the people, to the family, and to the church, where it belongs.

160. I Samuel 13:13-14.

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