Secular Control of Non-Public Schools

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SECULAR CONTROL OF NON-PUBLIC SCHOOLS

INTRODUCTION

Secular control of non-public schools has been severely challenged in the United States in the last twenty-five years. At the heart of this challenge lies a conflict between the state's interest in universal education and the individual's right to the free exercise of religion guaranteed by the first amendment, a conflict which seemingly defies any simple or satisfactory judicial resolution. Two widely divergent demands of contemporary society render resolution of this conflict even more difficult. The complexity of today's world demands that in order to function properly within society, every individual must receive more and better education than ever before, thereby weighing in favor of increased state regulation of education to insure that such quality education is received by all. But balanced against this demand is the mounting public support for recognition of the rights of the individual. Such recognition would weigh in favor of the individual's right to freedom of religious exercise triumphing over any restrictive state regulation. The fundamental polarity of these political trends sharpens the already severe dichotomy between the conflicting legal issues involved in state control of parochial schools.

The lively controversy surrounding state regulation of parochial schools, the difficulty of balancing the legal issues involved, and the divergence of public sentiment that must be weighed in reaching a solution make the question of the state's right to regulate parochial schools one apt for consideration. In analyzing this question, recent Supreme Court decisions will first be examined to delineate any applicable standards for parochial school regulation. The West Virginia position on the subject, ascertainable through statutes, regulations, and case law, will then be discussed in light of the previously outlined Supreme Court standards. In making this comparison, it is the purpose of this discussion to demonstrate that although West Virginia is in general compliance with Supreme Court standards for parochial school regulation,

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1 This argument was central to the state's case in Wisconsin v. Yoder, 406 U.S. 205 (1972).
2 Parochial school, as used in this discussion, means any religiously affiliated, non-public elementary or secondary school.
there are several fundamental areas wherein the West Virginia position clashes with these national standards.

STATE INTEREST v. INDIVIDUAL INTERESTS

The conflict between the state's interest in enforcement of its laws and regulations and an individual's first amendment right to the free exercise of religion has been an issue frequently confronted by the United States Supreme Court. The treatment of this conflict by the Court has evolved principally through three stages. In the first stage, the Court employed a simple test based on a belief-action dichotomy. Religious beliefs were protected by the first amendment, but religious actions were required to be made in conformity with state statutory provisions.\(^3\) The chief virtue of this test was its easy, mechanical application. It did little, however, to protect the exercise of religion from state control, since as soon as a religious belief was expressed in a positive action, it was subject to secular regulation. This test thus subordinated first amendment freedom of exercise rights to the state's interest in enforcement of its laws. The protection of religious freedom afforded by this test was specious at best. In the 1940's, the Supreme Court entered its second evolutionary stage. The Court abandoned the belief-action standard\(^4\) and substituted a balancing test whereby a religious act would be exempted from compliance with a statute when the purpose of the statute or the means by which it was enforced was directed at no significant state goal and denial of an exemption would result in a severe burden on the free exercise of religion.\(^5\) Although this standard was less restrictive than its predecessor, the balance still weighed heavily in favor of the state's regulation of religious activity. However, in Sherbert v. Verner,\(^6\) the Court, although reaffirming its previously adopted balancing test, shifted the balance in favor of the right to freedom of exercise and thereby entered the third stage. The Court accomplished this shift by ex-

\(^3\) This belief-action test was first propounded in Reynolds v. United States, 98 U.S. 145 (1878), a case involving polygamy among Mormons.

\(^4\) Cantwell v. Connecticut, 310 U.S. 196 (1940), marked the first clear abandonment of the belief-action test and hinted at the need to balance the state's interest in uniform enforcement against the individual's right to freedom of religious exercise.

\(^5\) 18 VILL. L. REV. 955, 957 (1973). This article provides a more detailed discussion of these three evolutionary stages in the Supreme Court's treatment of religion-state conflicts.

panding the class of freedom of exercise claims protected from statutory infringement and by forcing the state to prove a much higher state interest in enforcement than had previously been required.

In situations involving a clash between a state's interest in enforcing its school laws and a parochial school's rights under the freedom of exercise clause, the Supreme Court has followed the same standards applicable to first amendment cases generally, i.e., the Court employs a balancing test to determine whether particular acts or omissions of a parochial school are exempt from statutory control. The specific elements of the balancing test employed in parochial school cases flow from the Court's interpretation of the freedom of exercise clause. The Court has consistently held that the freedom of exercise clause cuts two ways: it protects religion and religious expression from undue state interference and it precludes the state from aiding or fostering any religion. From this basic tenet, the Court has derived several corollaries. Perhaps the most important of these corollaries is the concept that church and state must operate as distinct entities. This separation, however, has not been conceived of as an impenetrable wall, but instead as a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." However porous this barrier may be, the Court has nevertheless affirmed its existence repeatedly. "The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress." Another derivative of the Court's reading of the freedom of exercise clause is that a state has a right reasonably to control all schools it allows to operate within its boundaries. This corollary defines generally the level of state regulation of parochial schools acceptable under the freedom of exercise clause.

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8 Id. at 214.
In addition to these two corollaries, the Court has derived another idea which does not grow out of its interpretation of the freedom of exercise clause, but is nevertheless closely akin to it. This is the concept of the right of parents to send a child to any school they wish.\textsuperscript{12}

From this interpretation of the first amendment’s freedom of exercise clause and the resulting corollaries, the Court has developed a three-pronged test for determining whether a particular statute is constitutionally deficient. To pass constitutional muster, a statute must (1) have a primary effect that neither advances nor inhibits religion, (2) avoid excessive entanglement between church and state, and (3) reflect a clearly secular legislative purpose.\textsuperscript{13} This test is especially relevant to situations involving parochial schools, because most state regulation of such schools is accomplished through statutory provision. In general, application of this test has resulted in the Supreme Court upholding state statutory schemes for parochial school regulation. Even in those decisions in which the Court held that a statute did not pass constitutional muster, the Court was careful to emphasize that its decision struck down only the particular statute in question, and in no way challenged the general state control of parochial schools.\textsuperscript{14}

**West Virginia’s Statutory Scheme**

It is against this background of the Supreme Court’s construction of the freedom of exercise clause as expressed in its three-pronged test for statutory validity that the West Virginia scheme of parochial school regulation must be examined. Decisions of the Supreme Court on the subject also function as the standard with which to compare the West Virginia regulatory plan. In analyzing

\textsuperscript{12} Pierce v. Society of Sisters, 268 U.S. 510 (1925). This right has, however, been very closely restricted in scope. In Runyon v. McCrory, 427 U.S. 160 (1976), the Court stated: “[W]hile parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.” Id. at 178. In Wisconsin v. Yoder, 406 U.S. 205 (1972), it was stated that the right of parents to direct the upbringing of their children lent “no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.” Id. at 239 (concurring opinion).

\textsuperscript{13} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

\textsuperscript{14} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).
NON-PUBLIC SCHOOLS

West Virginia's law regarding parochial schools, attention will be directed to three specific areas: the compulsory school attendance statute,\textsuperscript{15} teacher certification requirements,\textsuperscript{16} and release time programs.\textsuperscript{17} Each of these areas contains elements that are inconsistent with Supreme Court guidelines for parochial school regulation.

\textit{Compulsory School Attendance}

The West Virginia compulsory school attendance law is codified in chapter 18, article 8, section 1 of the West Virginia Code of 1931, as amended.\textsuperscript{18} The statute requires all children to attend public school from their seventh birthday to their sixteenth birthday. The statute then provides ten exemptions to the statute’s general language, among them an exemption for instruction in a private, parochial, or other approved school.

The statute as written is undeniably in compliance with the standards pronounced by the Supreme Court. The Supreme Court has consistently maintained a state's right reasonably to regulate all schools it allows to operate within its boundaries,\textsuperscript{19} and compulsory school attendance has been viewed as a requirement that

\textsuperscript{15} W. Va. Code § 18-8-1 (1977 Replacement Vol.).
\textsuperscript{16} Id. § 18A-1-1.
\textsuperscript{17} Although not specifically dealt with in the West Virginia Code, such release time programs, approved by the Supreme Court in Zorach v. Clauson, 343 U.S. 306 (1952), necessarily interface with provisions of the school law.
\textsuperscript{18} This Code section states:

\begin{quote}
Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday.

Exemption from the foregoing requirements of compulsory public school attendance shall be made on behalf of any child for the following causes or conditions, each such cause or condition being subject to confirmation by the attendance authority of the county:

\textit{Exemption A. Instruction in a private, parochial or other approved school.} Such instruction shall be in a school approved by the county board of education and for a time equal to the school term of the county for the year. In all such schools it shall be the duty of the principal or other person in control, upon the request of the county superintendent of schools, to furnish to the county board of education such information and records as may be required with respect to attendance, instruction, and progress of pupils enrolled between the ages of seven and sixteen years.
\end{quote}

W. Va. Code § 18-8-1 (1977 Replacement Vol.). The statute goes on to set out nine other exemptions to its general language.

\textsuperscript{19} See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971).
easily falls within the scope of the state’s regulatory rights. Moreover, the constitutional right of parents to send their children to private or parochial schools, clearly recognized by the Supreme Court in *Pierce v. Society of Sisters*, is expressed in exemption A of the statute. The West Virginia Supreme Court of Appeals has also recognized that this statute “merely expresses a right guaranteed by constitutional provisions.” Thus, West Virginia’s compulsory school attendance statute appears on its face to be in compliance with the standards pronounced by the Supreme Court.

Application of the Court’s three-pronged test of statutory validity under the freedom of exercise clause confirms this initial impression. The statute surely has a primary effect that neither advances nor inhibits religion. The exemption allowing a parent to send his child to any approved private or parochial school in lieu of public school attendance cannot be said to inhibit religion. Nor does the statute advance any religious cause, as its language neither expressly nor impliedly favors the attendance of a parochial school over the attendance of public school. The statute also avoids excessive entanglement between church and state, the second prong of the statutory validity test. The statute merely provides for an exemption from compulsory public school attendance for those who attend parochial schools. It does not foster state support of such parochial schools nor their regulation by the state beyond reasonable minimum standards. The State of West Virginia, in enacting the compulsory attendance statute, has asserted an interest in the education of its citizens. Such an interest reflects the “secular legislative purpose” contemplated by the third prong of the Supreme Court’s test for statutory validity.

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20 Even in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where it was held that the Wisconsin compulsory school attendance statute unconstitutionally infringed upon the rights of the Old Order Amish, the infringement resulted from the statute’s extension of required attendance up until the age of sixteen, not from the intrinsic nature of the statute. The Court implied that a compulsory attendance statute of shorter duration would pass constitutional muster.


22 The Supreme Court has stated that compulsory school attendance statutes are generally within the power of the state to regulate all schools it allows to operate. *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); see *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

However, although West Virginia's compulsory school attendance statute lies generally within the ambit of state regulatory authority approved by the Supreme Court, in one important aspect the statute goes beyond these boundaries. The language of exemption A requires that to satisfy the provisions of the statute, the private, parochial, or other school attended must be approved by the county board of education wherein the school is located. This approval requirement, while fundamentally within the regulatory power of the state, fails to meet the standards set out by the Supreme Court that such regulation be reasonable and nondiscriminatory. The failure of the approval clause results from the absence in the statutory language of any standards upon which approval is to be based. In *Poulos v. New Hampshire*, the Supreme Court held that regulation of first amendment rights is invalid where the authority to permit the exercise of such rights lies within the complete discretion of administrative officials. Such arbitrary approval could lead to abuse of the regulatory powers of the state, thus placing a "forbidden burden upon the exercise of liberty protected by the Constitution." 

By not establishing criteria for approval of non-public schools, West Virginia's compulsory school attendance statute leaves open the possibility of just such an abuse of discretion as foreseen by the Supreme Court in *Poulos*. Conceivably, a county board of education could refuse approval of a parochial school that is in full compliance with every standard, guideline, and regulation governing public schools. Whether such an abuse of discretion has ever or would ever occur is irrelevant; that the possibility exists is sufficient to invalidate the approval clause under the *Poulos* holding.

Of course, the arbitrariness of the approval clause could be mitigated, and perhaps the validity of the approval clause as written saved, if the actual approval process employed in West Virginia could be shown to be based upon reasonable and non-

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25 The statute states specifically: "Such instruction shall be in a school approved by the county board of education and for a time equal to the school term of the county for the year." W. Va. Code § 18-8-1 (1977 Replacement Vol.).
27 345 U.S. 395 (1953).
discretionary criteria. Unfortunately, such a demonstration is extremely difficult to make. Under the West Virginia statutory framework, the state board of education is vested with authority only to prescribe minimum standards for the courses of study in state schools.30 Beyond these minimum standards, each county may independently prescribe standards for those schools operating under its authority. The West Virginia Department of Education does issue guidelines concerning approval of schools under exemption A of West Virginia Code section 18-8-1, but these guidelines are not binding on county boards of education. Thus, there are no consistent statewide criteria for parochial school approval; they may vary with each county. Furthermore, there is no state review of these independent county standards as long as they meet the statutorily mandated state minimum standards. This lack of uniformity, rather than mitigating the approval clause's arbitrariness, serves instead to reinforce it.

Even if it were proven that any non-public school that met a county board's standards was granted approval totally without regard to whether it was a public or non-public school, thus demonstrating that despite the statutory and practical opportunity for abuse of a county board of education's discretion, there has never been such an abuse, it is still unclear whether the approval clause could withstand an allegation of arbitrariness. The potential for abuse, however unlikely, still exists. Such potential would be sufficient to invalidate the approval clause under the language of the Court in Poulos v. New Hampshire.31

Thus, from both a purely statutory and a purely pragmatic viewpoint, the approval clause of exemption A appears to run afoul of the first amendment's protection of religious exercise by placing an undue prior restraint on that exercise. The invalidity of the approval clause would not, however, invalidate the entire compulsory school attendance statute. As previously noted, such statutes have generally received the imprimatur of the Supreme Court.32 Nor does the invalidity of the approval clause as now written mean that no approval clause could withstand judicial scrutiny. The removal of the elements of arbitrariness from the clause would suffice to bring it within the ambit of the state's regulatory authority with regard to parochial schools.

Teacher Certification Requirements

Another area of conflict in the regulation of parochial schools by the State of West Virginia lies in the teacher certification requirements of the West Virginia Code.32 The conflict here, however, unlike that involved in the compulsory school attendance statute, results not from a clash with constitutional rights or with Supreme Court mandated standards for application of first amendment principles, but rather from the language of the statute itself. A requirement that all elementary and secondary school teachers be certified, including those employed in parochial schools, appears generally to be within the authority of the state to mandate minimum requirements for those schools it allows to operate within its boundaries.34 Such a requirement merely implements the state's secular concern for the universal education of all children. The courts have recognized that the teacher plays a vital role in shaping his students' attitude toward the society in which they live.35 Teacher certification requirements aid in insuring that the integrity of the schools is preserved by helping to insure that the best qualified individuals fill teaching positions.

Thus, a requirement of certification for all teachers would, arguably at least, be within the state's regulatory authority. But the pertinent West Virginia statute does not appear to include parochial schools or parochial school teachers within its scope.36 The certification requirement under the statute is applicable to any professional educator "who is employed within the public school system of the State."37 The statute also defines

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35 The controlling statute provides in pertinent part:
Any professional educator, as defined in article one of this chapter, who is employed within the public school system of the State shall hold a valid teaching certificate licensing him to teach in the public schools in the specializations and grade levels as shown on his certificate for the period of his employment.
36 W. Va. Code § 18A-1-1 (1977 Replacement Vol.) defines "professional educator" as synonymous with the W. Va. Code § 18-1-1 definition of "teacher." This code section provides: "'Teacher' shall mean teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this State."
"professional educator" as synonymous with the definition of "teacher" given in chapter 18 of the Code. Thus, the language of the statute requiring certification excludes parochial school teachers from the class regulated by its provisions by both express and operational definition. Furthermore, the statute requires only that the certificate license a teacher to teach in the public schools. It may be assumed, therefore, that no such certificate is necessary to teach in a parochial school, even if the teacher in question were to be viewed as one who is within the class controlled by the statute. In fine, the teacher certification statute on its face applies only to public school teachers teaching in public schools.

Nonetheless, the decision of the West Virginia Supreme Court of Appeals in State ex rel. Hughes v. Board of Education would appear to make the teacher certification requirement also binding upon parochial school teachers. In the opinion by Judge Calhoun, the court stated that "[T]he parochial schools are required by statute to conform to standards, rules and regulations prescribed for the operation and maintenance of public schools." This language, taken at face value, would require parochial school conformity to the exigencies of the teacher certification statute despite the inapplicability of the statute to parochial schools under its express wording. For several reasons, however, Hughes is inapposite to the teacher certification issue.

Hughes involved two separate mandamus proceedings, consolidated for decision, concerning the question of the right of children attending Catholic parochial schools to demand transportation to and from their schools on buses owned and operated by county boards of education. The court held that the school children in question did have a right to transportation on county school buses and that mandamus was the proper remedy in that situation. The decision turned on the court's construction of a statute concerning public transportation of school children and a determination that that construction was constitutional.

38 Id. § 18-1-1. See note 36 supra.
39 Id. § 18A-3-1.
41 Id. at 122, 174 S.E.2d at 720.
42 W. VA. CODE § 18-5-13(6) (1977 Replacement Vol.), which provides in pertinent part:

The boards . . . shall have authority:

(6) (a) To provide at public expense adequate means of transportation, including transportation across county lines, for all children of
The crucial statute in *Hughes* was a part of chapter 18 of the West Virginia Code of 1931, as amended. In construing this statute, the court first examined the entire chapter and concluded that it did not apply solely to public schools. Therefore, the court reasoned, when its statutory language included the phrase “all children of school age,” as did the statute in question, it clearly and unambiguously included all school-age children within the statutory purview, encompassing those attending private and parochial schools. Since the basis of the *Hughes* decision resulted from an examination of chapter 18 of the Code, the *Hughes* analysis is inappropriate in regard to teacher certification requirements, which are delineated only in chapter 18A of the West Virginia Code. 3 Furthermore, its inappropriateness stems not only from the difference in statutory subject matter, but also from the impossibility of analogizing the *Hughes* analysis of chapter 18 to chapter 18A. Whereas the court in *Hughes* found that chapter 18 applied to both private and parochial as well as public schools, chapter 18A applies specifically to public school personnel only. 4 The limited scope of the statutory authority destroys the necessary foundation for application of the *Hughes* analysis to the teacher certification question.

Despite the express confinement of chapter 18A to public school personnel and the inclusion of private and parochial schools within the scope of chapter 18 of the Code, the West Virginia court has held that these chapters, though not enacted at the same time, should be considered *in pari materia* and that, therefore, they should be read and considered together. 5 Nonetheless, due to the express provisions of chapter 18A, this statement of the West Virginia court that chapters 18 and 18A should be read together

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43 Id. § 18A-3-1.

44 Chapter 18A, article 2 of the West Virginia Code of 1931, as amended, is entitled *School Personnel*. W. Va. Code § 18A-1-1 (1977 Replacement Vol.) defines “school personnel” as “all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise.” Furthermore, it is made crystal clear throughout the provisions of the chapter that its provisions apply only to public school employees.

should not be taken as extending the scope of chapter 18A to include private and parochial school personnel.

Even assuming that the *in pari materia* nature of these two chapters expands the scope of chapter 18A to include parochial school personnel, *Hughes* would still not present a valid precedent for mandatory compliance with certification requirements by parochial school teachers. At best it would only compel compliance with these standards by Catholic school teachers, since the *Hughes* decision was expressly limited to Catholic parochial schools. But even that reading of *Hughes* is questionable, because the language in the decision supporting parochial school conformity to public school regulations is clearly dictum. The statement that parochial schools must conform to the prescribed public school regulations constitutes no part of the holding, nor is it a necessary step in the logical process of arriving at that holding. Indeed, it is almost a parenthetical, an afterthought. The characterization of this statement as dictum makes it a truly fragile foundation upon which to base a non-public school teacher certification requirement.

Moreover, although the outcome of the *Hughes* decision is laudable, the rationale employed to reach it is less praiseworthy. Under the guise of statutory construction, the West Virginia Supreme Court of Appeals resorted in reality to judicial legislation. While it is true, as Judge Calhoun pointed out in the *Hughes* opinion, that certain sections of chapter 18 apply to private and parochial schools as well as to public schools, the general tenor of the chapter is that it governs only public schools. More im-

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46 The court states:
The decision of the Court in these cases relates solely to the duties of the respondent county boards of education in relation to Catholic parochial schools. We are not called upon to undertake to decide in these cases other cases of a similar nature which might be presented to the Court for decision hereafter.

47 The statement is used primarily in pointing out that the Catholic school systems provide a "splendid financial bargain" to county boards of education by furnishing a quality education to a substantial number of students; students who would otherwise have to be educated in the public schools at public expense. *Id.* at 122, 174 S.E.2d at 720-21.

48 See, e.g., W. Va. Code § 18-1-1 (g), (i) (1977 Replacement Vol.), defining "teacher" as one regularly employed for instructional purposes "in a public school in this State" and "regular full-time employee" as a person "employed by a county
importantly, the statute in question\textsuperscript{49} almost certainly applies only to public schools. The statute sets out the general authority of county boards of education. In detailing the county boards' authority, the phrases "all schools" and "any school" are used consistently in contexts indicating that only public schools are included within their scope.\textsuperscript{50} To say, then, that in providing for transportation for school children living more than two miles from school the statute is meant to include parochial as well as public school children simply because the word "all" is used perverts the statute's true intent. As the construction of this statute is the crux of Hughes, such a questionable reading threatens the validity of the entire rationale of the decision. For this reason, Hughes may not provide sound precedent upon which to base future decisions. Thus, to make extrapolations concerning parochial school conformity to public school regulations from the language of the opinion is unwise.

The uncertainty regarding the scope and precedential authority of the Hughes decision combines with the express limitation of applicability of chapter 18A of the Code to public school personnel only\textsuperscript{51} to lead to the conclusion that although the State of West Virginia may possess the constitutional authority to require parochial school teacher certification, there is at present no clearcut statutory right to do so. Furthermore, despite the general constitutionality of teacher certification requirements, there remains one area in which there exists the possibility that even the constitutionality of such requirements may successfully be challenged. This constitutional challenge lies in the very nature of the certification requirements themselves.

The statute detailing certification requirements\textsuperscript{52} states that such a certificate may be issued only to a person "who has completed the requirements for a bachelor's degree from an accredited institution of higher education."\textsuperscript{53} Some fundamentalist religions,
however, do not allow their members to attend school, or at least any accredited school, beyond the period mandated by the compulsory school attendance statute. As a result, none of the teachers employed in their parochial schools are able to gain certification. The only manner in which these religions would be able to employ certified teachers would be to convert already certified teachers to their religion. Obviously, it would be completely unrealistic to expect these schools to conform to a teacher certification requirement by such proselytization. Thus, conformity with certification standards would be practically impossible for these sects. The certification standards could be viewed, therefore, as an undue prior restraint on the right to free exercise of religion, since the impossibility of compliance with the statutory certification mandates would preclude the operation of parochial schools, a right at least arguably protected by the first amendment. Of course, this entire analysis is purely conjectural, because there has as yet been no known challenge to teacher certification requirements on this ground. Nonetheless, it is fairly analogous to the Supreme Court's rationale in Wisconsin v. Yoder, setting aside a compulsory school attendance statute as an infringement of first amendment rights. In addition, then, to the statutory challenge to West Virginia's teacher certification requirement, the right may also possibly be challenged on a constitutional basis.

Release Time Programs

The final area of concern regarding state regulation of parochial schools lies in the release time concept. This idea entails the release of students in public schools for a period of time during the school day to receive religious instruction. The Supreme Court has approved such programs if they meet certain criteria. In essence, the Court has upheld the constitutionality of release time programs if such programs maintain the neutrality of the public school educational process. In effect, this standard requires that the religious instruction must be given off the public school prem-

54 Most notable among these religions is the Old Order Amish. See Wisconsin v. Yoder, 406 U.S. 205 (1972).
55 Specifically, the certification statute would then violate the first prong of the Supreme Court's triad test for constitutional statutory validity by having a primary effect that inhibits religion.
ises and that the public school cannot be used as the vehicle to promote or foster participation in the release time program.88

West Virginia implicitly authorizes release time programs in exemption J of the compulsory school attendance statute.59 Nonetheless, difficulty may be encountered in implementing such a program in this state due to conflicts with statutory and regulatory provisions. These conflicts arise out of the practical impossibility of implementing such programs without violating these provisions.

The West Virginia Code grants the state board of education the authority to prescribe the courses of study for "public elementary and grammar schools, public high schools and state normal schools."0 The Code also provides that those persons controlling private, parochial, and denominational schools have a duty "to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools." Moreover, the state board of education has been vested with the general authority to make rules for effectuating the laws and policies of the state relating to education.62

Pursuant to this authority, the West Virginia Board of Education has promulgated regulations concerning the broad spectrum of the state educational program. Among these regulations are provisions controlling the length of the weekly minimal instruction period, the length of the school day, and required courses of study.63 Such regulations seem to be clearly inapropriate to the im-

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88 Thus, in Zorach v. Clauson, 343 U.S. 306 (1952), the Court upheld the release time program in question because the religious instruction was given completely off the school premises. In the course of the opinion, Justice Douglas distinguished McCollum v. Board of Education, 333 U.S. 203 (1948), wherein an Illinois release time program had been struck down, on the ground that in McCollum the religious instruction had been given in the public school building itself, thereby promoting an excessive entanglement between church and state. Id. at 309.

Exemption J provides:
The county board of education may approve exemption for religious instruction upon written request of the person having legal or actual charge of a child or children: Provided, however, that such exemption shall be subject to the rules and regulations prescribed by the county superintendent and approved by the county board of education.

W. VA. CODE § 18-8-1 (1977 Replacement Vol.).

59 Id. § 18-2-9.

60 Id.

61 Id. § 18-2-5.

62 See, e.g., W. VA. BOARD OF EDUCATION, SECONDARY SCHOOLS STANDARDS FOR CLASSIFICATION, 5, 8 (1966).
plementation of a release time program if they are rigidly enforced. The problem is particularly acute in elementary schools, where the impact of release time programs is most profound. The regulations are such that the entire school day is taken up with required courses, and the entire school day, exclusive of the lunch time recess, is part of the minimum instruction period. There is no excess time available in which to schedule a release time program. Participation in such a program would thereby necessarily require that the student miss at least one required class a week and an indeterminate amount of required instruction time, resulting in a violation of the state board's regulatory provisions. Such a violation would be punishable as a misdemeanor under provisions of the West Virginia Code.4

By making participation in a release time program a punishable activity, these statutory and regulatory provisions would have a primary effect that inhibits religious expression, and would therefore run afoul of the Supreme Court's standards for regulatory validity under the first amendment. While it may be argued in defense of these provisions that they represent only reasonable and nondiscriminatory regulation of first amendment rights, thus assuring their constitutionality,5 this argument loses force in the face of the express approval of release time plans by the Supreme Court and the adverse effect strict enforcement of these regulations would have on such plans. Moreover, the tenor of recent Supreme Court decisions has been that even clearly reasonable and nondiscriminatory regulations affecting first amendment rights must be set aside when they interfere with the expression of religion protected under the freedom of exercise clause.6 Therefore, assertion of the reasonableness of the regulations concerning length of school day, minimum instructional time, and required courses of study will be of no impact if it is shown that such regulations abridge the right of free religious exercise.

Such a showing would not be especially difficult to make. It is obvious that the threat of punishment for contravention of these

4 W. VA. CODE § 18-2-9 (1977 Replacement Vol.). Under this code section, each week in which there is a violation constitutes a separate offense.
6 See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972), wherein the Court, despite approval of the challenged compulsory school attendance statute, nevertheless struck it down where it conflicted with the free exercise of religion by the Old Order Amish.
regulations would have a chilling effect upon the assertion of first amendment religious rights. By thus inhibiting the establishment of release time programs in the public schools, a right which has been upheld as a legitimate religious expression\textsuperscript{7} would be denied, imposing, therefore, an unconstitutional restraint on those persons wishing to implement or participate in a release time program.

CONCLUSION

Having noted the probable constitutional infirmity of state board of education regulations in conflict with release time programs, it must also be remarked that this infirmity, as in the instances of the compulsory school attendance statute and teacher certification requirements, can be overcome by proper legislative action. Certainly state board modification of its regulations, particularly with regard to minimum instructional time and required courses, would go a long way toward alleviating the difficulties of release time programs. Similarly, with regard to the approval clause of the compulsory school attendance statute, legislative modification of the statute to the effect that approval of parochial schools would be granted upon a showing that the school met the minimum standards applicable to public schools within the county would seem to cure the constitutional infirmity of this statute. The difficulties of the teacher certification requirements could be eliminated by inserting appropriate language making them applicable to private and parochial schools, as well as public schools. To resolve the constitutional conflict involving the college graduation standard of the certification statute, it may be necessary to create a specific exemption from this standard for members of those sects forbidding college attendance.

These three areas of conflict may, then, be eliminated by an imaginative and carefully structured legislative effort. In so doing, West Virginia school law would be brought into substantial harmony with those standards outlined by the Supreme Court for church and state interaction regarding secular regulation of parochial schools.

\textit{Carl L. Fletcher, Jr.}

\textsuperscript{7} Zorach v. Clauson, 343 U.S. 306 (1952).