

# The Nature of the Wall

## The State and Private Schools

MERLE WILNA FLEMING

IN THIS COUNTRY, or at least in this state, most of us take for granted that a child will go to school, a graded school known as "K through 12." It will be, most often, a public school, but it may be a private or parochial school. Do we assume that each child has a right to an education? When did each child acquire such a right? Or does it exist? What kind of education? Who will make certain that each child gets an education? Most of us, I believe, take as given that children will be educated. But the answers to these questions are not so clear, and there is no end to the complexities when we consider any aspect of education.

As we consider the nature of the wall between the state and private schools, the perspective with which we consider the issues merits attention. Are we concerned with the rights or interest of the child? Are we more concerned with the rights or interest of the parents? Are we concerned with the interests of the entities that operate private schools? Or are we concerned with the interest of the state in the education of the child? The rights or interests of the child, the parent, the schools, and society may be identical, may overlap, or may be conflicting. It is from conflicts among those interests that litigation arises.

The United States Supreme Court has decided many constitutional issues pertaining to the education of children. Some important principles that emerge may be familiar; some principles provide a foundation for understanding the constitutional

issues relevant to state regulation of private schools. Much of the authority to develop educational systems has been left to the states. Constitutional principles are created when specific statutes, regulations, or policies are challenged.

The first principle that seems to me of grave importance is that education in the abstract is not a child's fundamental right.<sup>1</sup> Yet once a public school has been established, the child's right to access to that institution cannot be denied. Segregation of children by race does violate the United States Constitution.<sup>2</sup> The United States Supreme Court, in deciding *Brown v. Board of Education*, said that "today, education is perhaps the most important function of state and local governments."<sup>3</sup> The Court has also ruled that states may not exclude children of illegal aliens from public schools.<sup>4</sup> Thus, the Court has emphasized the overwhelming importance of education for a child in this nation.<sup>5</sup> Where states have established a public school, the right of access to education is so crucial that it rises to the level of a property or liberty interest of such magnitude that a child cannot be suspended from public school for as much as ten days without "some kind of hearing" under the due process clause.<sup>6</sup>

Whereas education for the child is not a fundamental right, parents do have a fundamental right to direct the upbringing of children under their control, including a right to send children to a private or parochial school should they so prefer.<sup>7</sup> In con-

---

1. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

2. *Brown v. Board of Education*, 347 U.S. 483 (1954). The Iowa Supreme Court banned school segregation in Iowa schools eighty-six years before *Brown* in *Clark v. Board of Directors*, 24 Iowa 266 (1868). The Iowa ruling was based on the language of the Iowa Constitution of 1856, which requires that education be provided for "all the youths" of the state. Iowa Const., Art. IX, § 12. See also *Smith v. Directors*, 40 Iowa 518 (1875). Under Iowa's first constitution and the statutes, school segregation was actually required. See Arnie Cooper, "A Stony Road: Black Education in Iowa, 1838-1860," *Annals of Iowa* 48 (Winter/Spring 1986), 113-34.

3. *Brown*, 347 U.S. at 493.

4. *Plyler v. Doe*, 457 U.S. 202 (1982).

5. *Ibid.* at 221-24.

6. *Goss v. Lopez*, 419 U.S. 565 (1975).

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

trast, a constitutional right to educate children at home does not exist.<sup>8</sup> Parental rights are not absolute.<sup>9</sup>

On issues affecting separation of church and state arising from the First Amendment to the federal Constitution, school prayer and the posting of the Ten Commandments in public schools violate the establishment clause.<sup>10</sup> Government aid to parochial schools, including aid for parochial school teachers and instruction by public school teachers in a parochial school, has also been determined to violate the establishment clause.<sup>11</sup> On the other hand, aid to the parent or child for transportation or secular textbooks does not.<sup>12</sup>

States may not prohibit the teaching of foreign language in public schools, a notion that seems archaic now.<sup>13</sup> If states receive federal aid for special education, a child in need of special education is entitled to a "free appropriate education," and that right carries with it a host of procedural protections.<sup>14</sup>

All fifty states do have public school systems even though the United States Constitution does not require them. Laws and

---

8. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the U.S. Supreme Court observed that "the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes." *Ibid.* at 246, 247, citing *People v. Turner*, 121 Cal. App. 2d 861, 263 P.2d 685 (1953), app. dismissed for want of a substantial federal question, 347 U.S. 972 (1954). For more recent cases, see *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *Burrow v. State*, 282 Ark. 479, 669 S. W.2d 441 (1984); *State v. Edgington*, 663 P.2d 374 (N.M. 1983), *cert. denied*, 464 U.S. 940, *Hanson v. Cushman*, 490 F. Supp. 109 (W.D. Mich. 1980); *Scoma v. Chicago Board of Education*, 391 F. Supp. 452 (N.D. Ill. 1974); *State v. Riddle*, 285 S.E.2d 359 (W.Va. 1981); *In Interest of Sawyer*, 672 P.2d 1093 (Kan. 1983).

9. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding vaccination requirement); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor laws).

10. *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980).

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

12. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968).

13. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

14. 20 U.S.C. § 1400 et seq. (known as the Education for Handicapped Act); *Iowa Code* § 281.6 (1987).

regulations creating those public school systems are varied.<sup>15</sup> Implied by the title of this article is the notion of regulation of private schools by the state. The truth is that the extent of the regulation of private schools in the fifty states also varies accordingly. Regulation varies from none at all to substantial.

WHAT DOES THE CONSTITUTION REQUIRE and what does the Constitution permit or prohibit when states regulate the operation of private schools? Those constitutional issues are closely related to the operation of compulsory attendance laws. Therefore, attention to the development of compulsory education is necessary before we can examine the constitutional issues that have arisen in Iowa.

The first compulsory attendance law in the United States was adopted by Massachusetts in 1852, though a public school system had existed in Massachusetts as early as 1671.<sup>16</sup> The Iowa Supreme Court recognized the reasons for such a compulsory education law in 1871 in *Burdick v. Babcock*. There the court observed that the object of schools is "to secure education to the children of the State."<sup>17</sup> Compulsory education laws were recognized as benefiting children as part of the general welfare of society. *Burdick* came long before the Iowa compulsory education law, child labor laws, special education laws, and the host of other protective legislation governing the rights and welfare of children.<sup>18</sup> The children in *Burdick* had been expelled under school rules for excessive absences. At that time parents claimed that they were entitled to the services of their children. In other words, children had the status of chattel. In upholding the school rules, the court said, "If the education of children were compulsory upon parents, who could be reached by proper penalties, as for an offense for failure to send their chil-

---

15. An extensive discussion of the variety in state regulation of private schools is available in W. D. Valente, *Education Law Public and Private*, §§ 21.4-.6 (1985) (West). See also *Wisconsin v. Yoder*, 406 U.S. 205, 226, note 15 (1972).

16. 1852 Massachusetts Acts and Resolves, ch. 240; Massachusetts Colonial Laws, 136, 305.

17. *Burdick v. Babcock*, 31 Iowa 562 (1871).

18. See *Iowa Code Index* (1987) for a list of statutes pertaining to children.

dren to school, in that case the child could be relieved from the hardship of expulsion, and the parent made responsible for his acts in detaining him from school."<sup>19</sup>

The first compulsory attendance bill was introduced in the Iowa legislature in 1872, the year after *Burdick v. Babcock* was decided by the Iowa Supreme Court. But Iowa did not enact such a law until 1902, when it became the thirty-third state to adopt such legislation.<sup>20</sup> The 1902 statute was a simple one, but it contained the essential features that still exist in current law. Parents were required to cause children, age 7 to 14, with some exceptions, to attend a public, private, or parochial school for a given number of days per year. As an alternative, a child could "attend upon equivalent instruction by a competent teacher elsewhere than [in a] school." The bill also specified the courses to be taught: reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history.<sup>21</sup>

Violation of the statute was to be a misdemeanor, and conviction could result in a fine of not less than three dollars nor more than twenty dollars.<sup>22</sup> Penalties for violating the law were imposed on parents, not on private or parochial schools. Principals of private and parochial schools and parents who educated children "privately" were asked to report to the school district the names, ages, and attendance of their pupils, but failure to report was not yet designated as a crime. Public school officials,

---

19. *Burdick v. Babcock*, 31 Iowa at 569.

20. For an account of the forces that produced the Iowa compulsory attendance law, see Carroll Engelhardt, "Compulsory Education in Iowa, 1872-1919," *Annals of Iowa* 49 (Summer/Fall 1987), 58-76. The same issue of the *Annals of Iowa* contains a detailed description of the elementary and secondary public school system of Iowa in 1900. See Keach Johnson, "The State of Elementary and Secondary Education in Iowa in 1900," *Annals of Iowa* (Summer/Fall 1987), 26-57.

21. 1902 Iowa Acts, ch. 128, § 1. Cf. *Iowa Code*, ch. 299 (1987).

22. *Ibid.*, § 6. In general, the penalties for violating compulsory attendance laws have been harsher in other states than in Iowa. For example, fines of five hundred dollars and up to a year in jail upon conviction for violation of the compulsory attendance law were provided for in Virginia. *Rice v. Commonwealth*, 188 Va. 224 (1948). For current Virginia law, see 5 Code of Virginia § 22.1-254 et seq. (1985). That law permits home instruction, subject to extensive regulation. Violation of the compulsory education law is a misdemeanor. Parents may also be subject to laws having to do with children "in need of services." *Ibid.*, § 22.1-262.

on the other hand, were mandated to enforce the law; if they failed to do so, they were liable for a fine of not less than ten dollars nor more than twenty dollars for each offense. Public school officials were also obliged to take a census, to determine the number of children who did not attend school, and, if possible, to determine the cause of truancy.<sup>23</sup>

Between 1902 and 1924 some changes were made. In 1904 coverage was expanded to include children to age 16 or until completion of the eighth grade, and in 1909 the number of days of attendance was increased to 120.<sup>24</sup> In 1924, following amendments to the law, the code editor moved the list of subjects to be taught from the compulsory attendance chapter and placed it in a code chapter entitled Courses of Study. In 1931 the history of Iowa was added to the list of required courses.<sup>25</sup>

There is a gap in available information about compulsory education cases in Iowa's trial courts. However, historian Carroll Engelhardt has reviewed school statistics gathered and reported by the state superintendent and concluded that "despite spotty enforcement during its early years, the new law did produce increased attendance." After 1932 the number of non-attenders was no longer reported in the school statistics by the state department.<sup>26</sup> We simply do not know how many parents were convicted for violations. State trial court rulings are neither published nor granted precedential value. Misdemeanors were tried by justices of the peace in townships, in mayors' courts, and in other lower courts. A unified court system and the collection of court statistics came later.<sup>27</sup>

There is no doubt, however, that most children in Iowa attended school. The quality of education may have varied.

---

23. 1902 Iowa Acts, ch. 128, §§ 1, 2, 9.

24. 1904 Iowa Acts, ch. 116, § 1; 1909 Iowa Acts, ch. 186.

25. 1931 Iowa Acts, ch. 92. From 1924 through 1939, the compulsory attendance law appears at ch. 228, §§ 4410-32 in the *Iowa Code*. Ch. 214, § 4252 (1939) lists the common school studies and notes that 40 Ex. GA, S.F. 111, § 1, was editorially divided.

26. Engelhardt, "Compulsory Education," 73.

27. For the variety of courts in Iowa in, for example, 1962, see *Iowa Code*, ch. 231, 367, 601, 602, 603, 604, and 631 (1962). In that year Article V of the Iowa Constitution was amended to alter the process for selecting supreme court justices and district court judges by adding new sections 15, 16, 17, and 18.

One-room schools, K-8, taught by a single teacher, nine per township, were a part of the rural landscape.<sup>28</sup> City and town school districts were more likely to provide high school education.<sup>29</sup> In due course the right to a tax-supported high school education evolved; districts lacking high schools paid tuition for the children who resided in that district to attend high schools in other districts.<sup>30</sup>

Lawyers commonly look to statutes and court decisions to determine what the law requires. Between 1902 and 1981, however, the Iowa Supreme Court decided only one compulsory attendance case: in 1937, in *State v. Ghrist*, the Iowa court upheld the school district's power to designate the institution that a special education student would be obliged to attend.<sup>31</sup> The constitutionality of compulsory attendance laws was upheld elsewhere.<sup>32</sup> The guiding constitutional principles with respect to compulsory education law appear in *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923). A companion case, *Bartels v. Iowa*, was decided with *Meyer*.<sup>33</sup>

In 1922 the voters of Oregon adopted by referendum a law that required parents, guardians, or other persons in control of children age 8 to 16 to send them to a public school. Several cases had been brought by a parochial school operated by the Society of Sisters and a private military academy. The Court enjoined enforcement of the statute and ruled that the Oregon law "unreasonably interferes with the liberty of parents and

---

28. For the structure and governance of rural school districts in the past, see, for example, *Iowa Code*, ch. 208 (1935).

29. A detailed account of the early history of education in Iowa in five volumes was published by the State Historical Society of Iowa beginning in 1914. The first volume describes the development of school districts and the adoption of the free school law. See C. R. Aurner, *History of Education in Iowa* (Iowa City, 1914), vol. 1. Johnson, "The State of Elementary and Secondary Education in Iowa in 1900," also calls attention to the disparities between rural and urban education.

30. *Iowa Code* §§ 4275-78 (1927).

31. *State v. Ghrist*, 222 Iowa 1069, 270 N.W. 276 (1937).

32. See, for example, *Commonwealth v. Roberts*, 159 Mass. 372, 34 N.E. 402 (1893), and *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902).

33. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 403 (1923). In *Meyer* the U.S. Supreme Court ruled that the teaching of modern foreign languages to children could not be prohibited. 262 U.S. at 403.

guardians to direct the upbringing and education of children under their control."<sup>34</sup>

Thus *Pierce* stands for the principle that parents have a fundamental right or liberty to enroll children in a private school and cannot be compelled to send them to a public school.<sup>35</sup> But *Pierce* and *Meyer* also affirmed the power of states to adopt reasonable regulations to require that children of proper age attend school, that private schools teach certain subjects, and that states may regulate those who teach.<sup>36</sup> Succinctly put: children may attend private schools, but states may impose reasonable regulations on those schools. In *Lemon v. Kurtzman* (1971), the Court said, "A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."<sup>37</sup>

THE PHRASE IN THE TITLE "the nature of the wall" refers to a metaphor from Thomas Jefferson, who once described "a wall of separation between church and state."<sup>38</sup> The United States Supreme Court has used the metaphor, but justices have expressed some dissatisfaction with it. Justice Burger wrote, "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>39</sup> The wall-of-separation metaphor and the term *freedom of religion* oversimplify the two religious clauses of the First Amendment. Cases or issues asserted under the establishment clause require an analysis that is quite different from the analysis in free exercise disputes.

---

34. *Pierce v. Society of Sisters*, 268 U.S. at 530-35.

35. *Ibid.*

36. *Ibid.*, and *Meyer*.

37. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

38. The quotation from Jefferson appears in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), cited in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Reynolds*, the case in which a law prohibiting polygamy was upheld, the court said, "Laws are made for the government of *actions*, and while they cannot interfere with mere religious belief and opinions, they may with *practices*." *Reynolds*, 98 U.S. at 166.

39. *Lemon v. Kurtzman*, 403 U.S. at 614.



In *Lemon v. Kurtzman* the United States Supreme Court enunciated the test to be used in deciding establishment clause cases as follows: "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.'"<sup>40</sup> The vitality of that test has been reaffirmed repeatedly in the years since *Lemon* was decided.<sup>41</sup>

The applicable analysis in free exercise cases is more complex. The preliminary framework was set out in *Sherbert v. Verner* (1963), which provided a two-pronged analysis. First, does application of the statute constitute an infringement upon the individual's religious liberty? (Both direct and indirect burdens may be considered.) Second, is the burden imposed by challenged statutes justified by a compelling state interest?<sup>42</sup> The Court, in *Wisconsin v. Yoder*, expanded the first prong of *Sherbert* to inquire whether the religious activity at issue was motivated by and rooted in a sincerely held religious belief that is central to the religion.<sup>43</sup> The centrality aspect of the *Yoder* analysis requires a determination of fact.<sup>44</sup>

The next step in the analysis of whether a burden exists is an issue of law.<sup>45</sup> If a burden is cast on the central beliefs by regulations, then the state must show it has a compelling interest in the purpose the regulations seek to accomplish. If a court determines that a sincere, deeply rooted religious belief is at stake in conduct that is regulated pursuant to a compelling state interest, the court then engages in a balancing process. The purpose of the balancing process is to determine whether the burden imposed is justified by the compelling state interest.<sup>46</sup> In

---

40. *Ibid.*, citing *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), and *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

41. See, for example, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); and *Aguilar v. Felton*, 473 U.S. 402 (1985).

42. *Sherbert v. Verner*, 374 U.S. 398, 403-8 (1963).

43. *Wisconsin v. Yoder*, 406 U.S. 205, 215-18 (1972).

44. *Attorney General v. Bailey*, 436 N.E.2d 139, 145 (Mass. 1982), *cert. denied*, *sub nom. Bailey v. Bellotti*, 459 U.S. 970.

45. *Ibid.*, 436 N.E.2d at 146.

46. *Wisconsin v. Yoder*, 406 U.S. 204, 214-16 (1972).

cases in which a court has found that a compelling state interest is not at stake, the regulation falls with ease.<sup>47</sup> If the court determines that the compelling state interest outweighs the burden on religious belief or activity, the religious belief must give way.<sup>48</sup> If the court finds, as a matter of law, that the burden on religious belief outweighs the compelling state interest, the court then determines whether the compelling state interest can be met in a less drastic way, that is, by other means.<sup>49</sup> In *Yoder*, the Court decided that the compelling interest of the state in requiring attendance beyond eighth grade was overcome by Amish religious beliefs and practices. Moreover, the interests of the state in the education of the children were met by the Amish through their own vocational education in their isolated farming community.<sup>50</sup>

In summary, the test is (1) whether the religious belief asserted to be infringed is central; (2) whether such an interest is burdened; (3) whether the regulation serves a compelling state interest that outweighs the burden on religion; and, if plaintiffs prevail on the first three prongs, (4) whether a less drastic means is available to serve the compelling state interest.<sup>51</sup> Other constitutional issues arise in connection with regulation of private or church schools and require other analytical approaches.<sup>52</sup> Further, cases pertaining to statutes that accommodate religious organizations or the conduct of individuals require additional analytical concepts.<sup>53</sup>

It is not a wall between church and state; it is a great thorny thicket. The Court has said, "Our prior holdings do not call for total separation between church and state; total separation is

---

47. See *Sherbert v. Verner*, 374 U.S. at 407.

48. *United States v. Lee*, 455 U.S. 252, 260 (1982).

49. See *Sherbert v. Verner*, 374 U.S. at 407.

50. *Wisconsin v. Yoder*, 406 U.S. at 224-26, 234-36.

51. For a complete summary and application of the free exercise analysis, see *State v. Shaver*, 294 N.W.2d 883, 887-900 (N.D. 1980).

52. The U.S. Supreme Court uses a very strict analytical approach if a challenge to a statute or policy is based on an alleged burden or injury of a fundamental right. For a discussion of the court's analysis of constitutional issues, see Laurence Tribe, *American Constitutional Law* (Mineola, NY, 1978).

53. See generally *United States v. Lee*, 455 U.S. 252, 261 (1982); *Gillette v. United States*, 401 U.S. 437, 451-52 (1971).

not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.<sup>54</sup> Some private schools resist any regulation.<sup>55</sup> Other private schools and their patrons seek relationships with states in order to obtain benefits.<sup>56</sup> The constitutional decisions form an intricate tangle. And there is the political thicket.<sup>57</sup> Most state laws now regulate private schools *far less* than the Constitution permits.<sup>58</sup>

THE FIRST MAJOR INSTANCE OF RESISTANCE to Iowa's compulsory attendance law was the Amish controversy.<sup>59</sup> The Amish were among the early settlers in Iowa in the middle of the nineteenth century. Most were farmers. Amish and Mennonite children went to the rural one-room public schools and were taught by teachers with certificates.<sup>60</sup> Further, the Amish and Mennonites were concentrated in particular

---

54. *Lemon v. Kurtzman*, 403 U.S. 602, 614.

55. See cases listed at n. 88 below.

56. Aid for secular textbooks (see *Iowa Code* § 301.30 [1987]), aid for transportation (see *Iowa Code* § 285.3 [1987]), and tuition tax credits (see 1987 Iowa Acts, ch. 233, §§ 493, 494) are examples of such benefits.

57. Vigorous lobbying efforts in Nebraska led to amendments in the Nebraska law. The Iowa General Assembly has been subjected to similar pressure.

58. For example, North Dakota and Nebraska laws which required *approval* of private schools by the state were upheld. *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Nebraska ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, appeal dismissed, 454 U.S. 803 (1981). See also *Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988).

59. As one who grew up in an area heavily populated by Amish and Mennonites and who attended school with Amish and Mennonite children, the Amish controversy in Iowa was puzzling. My role as a lawyer in the recent cases related to the controversy is an aspect of my life that I can only regard as ironic. I was neither Amish nor Mennonite and so I was different, with all the results that descend on a child who is different—name calling, physical abuse, and all the rest. Most of the teachers in grade school were Mennonite. The women teachers wore "coverings." Further, the superintendent-teacher of the two-teacher high school, Center High School, Washington Township, Johnson County, was Mennonite during my high school years.

60. See *Iowa Code* §§ 1766–69 (1873) for the statute authorizing examination of applicants and issuance of teacher certificates by the county superintendent. *Iowa Code* § 1771 (1873) permitted a county superintendent to revoke a certificate after an investigation, notice to the teacher, and an opportunity for the teacher to be present and make a defense.

areas.<sup>61</sup> Therefore, the Mennonite farmers were the school board members in those rural districts in which they lived. Given the historical fact that public school teachers in Amish communities held certificates, the commentary that attributes most of the Amish controversy to their strong objections to state-certified teachers is subject to doubt.<sup>62</sup> Rather, the background of legislative change in 1967 led to the religious exemption from the Iowa compulsory education law which came to be known as the Amish exemption.<sup>63</sup>

Pressure to improve schools was strong after World War II. In 1953 drastic changes were enacted.<sup>64</sup> Selection of the state superintendent changed from a partisan election to appointment by the state board. The process for selecting the state board also changed. The superintendent was directed to promulgate minimum standards, including the subjects that were required to be taught. The superintendent also was directed to formulate an approval process for public schools. Private schools could seek approval, but such approval was not required and is *not required now*.<sup>65</sup> The teacher certification process changed as well.<sup>66</sup> Educational qualifications for teach-

---

61. For a discussion of the culture of Iowa's Old Order Amish communities, see Dorothy Schwieder and Elmer Schwieder, *A Peculiar People: Iowa's Old Order Amish* (Ames, 1975). The concentration of the Amish and Mennonite population continues. See the maps *ibid.*, 4 (for Iowa) and 140 (for the Midwest).

62. See, for example, Donald A. Erickson, "Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy," in *Public Controls for Nonpublic Schools*, ed. Donald A. Erickson (Chicago, 1969), 15, 53.

63. 1967 Iowa Acts, ch. 248, codified as *Iowa Code* § 299.24 (1987).

64. 1953 Iowa Acts, ch. 114-21.

65. 1953 Iowa Acts, ch. 114, §§ 1-5, 11, 18. Cf. *Iowa Code Supps.* § 256.11(10), (11), and (12) (1987). The main connection to a private school in Iowa that is *not approved* is *Iowa Code* § 299.3 (1987), which requires a principal of a private school to file reports. Nonpublic schools may seek approval or accreditation, but, except for the sanction of removal from the list of accredited schools, there is no penalty for schools that are not approved. In contrast, a public school district that fails to meet accreditation standards will be merged with another district. *Iowa Code* § 256.11(12).

66. The 1953 legislation established the State Board of Public Instruction as the Board of Educational Examiners and authorized the board to adopt rules for certification of teachers. 1953 Iowa Acts, ch. 14, § 10(11). For the history of the shift from teacher licensing by the county superintendent to the State Board of Examiners, see C. R. Aurner, *History of Education in Iowa*, 1: 297-335.

ers increased.<sup>67</sup> Moreover, the reference to private schools was deleted from the first paragraph of section 299.1 of the Iowa Code, leaving the requirement that children attend public school. The alternative for parents in the statute referred to *all education that was not in public school*. Thus the statute met the *Pierce* principle that parents cannot be required to send children to public school. The term *competent teacher* was changed to *certified teacher*.<sup>68</sup>

Other great changes flowed from those contained in the reorganization law of 1953. The legislature declared that it was the policy of the state to encourage reorganization. In 1957 the statement of policy became a mandate that all areas of the state be in a high school district by July 1, 1962. The one-room school was disappearing. In 1965 the deadline for reorganization was moved up to July 1, 1966.<sup>69</sup> Thus, the one-room Iowa public school became extinct about fifteen years after the passage of the reorganization law of 1953.

It was in that post-1953 era that the Amish resisted school laws, particularly in the Hazleton-Oelwein area when reorganization efforts began there.<sup>70</sup> A *Des Moines Register* photographer won a Pulitzer Prize for a posed picture of Amish children scattering into corn fields to avoid a school bus.<sup>71</sup> That picture has become part of a great Iowa myth, using the word myth properly as *symbolic truth*. It was a great media event.

During the months that it took for a blue-ribbon committee to propose a bill and for the General Assembly to act, the Amish children in the Hazleton area attended a private school

---

67. Qualifications for teachers changed over time. Various classes of certificates were authorized based on the education of the teacher. See, for example, *Iowa Code*, ch. 260 (1946).

68. 1953 Iowa Acts, ch. 114, § 41.

69. 1953 Iowa Acts, ch. 117, § 1; 1957 Iowa Acts, ch. 128, § 1; 1965 Iowa Acts, ch. 240, § 1.

70. The controversy was described in detail by Erickson, "Showdown at an Amish Schoolhouse," 15-60. The connection to reorganization is clear. Erickson testified on behalf of the Amish at the *Wisconsin v. Yoder* trial (see below). A more objective description of the controversy appears in Schwieder and Schwieder, *A Peculiar People*, 94-127.

71. The photograph by Thomas DeFoe first appeared on page one of the *Des Moines Register*, 20 November 1965. It was reprinted in Schwieder and Schwieder, *A Peculiar People*, 94-95.

taught by certified teachers who were paid by funds provided by The Danforth Foundation of St. Louis.<sup>72</sup> In my view, the Iowa Amish objected to children being transported to town and school, away from the community, and to the exposure to worldly influences.<sup>73</sup>

The Amish exemption was adopted before a similar controversy was resolved in Wisconsin. There, the Amish objected to a Wisconsin requirement that children attend school until age 16, which usually meant two years of high school.<sup>74</sup> Iowa law required, then as now, only that a child complete eighth grade, or reach the age of 16, whichever happened first.<sup>75</sup> The Wisconsin children had completed eighth grade in public school.<sup>76</sup> Thus, *Wisconsin v. Yoder* is not a case in which regulation of private schools was at stake. Instruction of Amish children by certified teachers was not an issue either. The court in *Yoder* expanded the analysis that is used by the courts when plaintiffs contend that free exercise of religion is violated.<sup>77</sup> The result of *Yoder* was a judicial exemption from attending high school for Amish.<sup>78</sup> In keeping with the Court's conclusion that few other groups could make the required showing, the outcome in other cases is usually different from *Yoder*.<sup>79</sup>

In Iowa in 1986-87, 520 children attended twenty-nine Amish and conservative Mennonite schools. Twenty-four of the twenty-nine schools were "Old Order" or "house Amish." The schools were located in only nine of Iowa's ninety-nine counties. Johnson County contained more Amish schools than

---

72. The committee was appointed in 1967. The religious exemption enacted by the legislature (1967 Iowa Acts, ch. 248, § 1, codified as *Iowa Code* § 299.24 [1987]), follows the pattern in the exemption from Social Security taxes which the Amish enjoy. See 26 U.S.C. 1402(g).

73. See Erickson, "Showdown at an Amish Schoolhouse."

74. *Wisconsin v. Yoder*, 406 U.S. 205, 207.

75. *Iowa Code* §§ 299.1, 299.2(2) (1987).

76. *Wisconsin v. Yoder*, 406 U.S. at 207.

77. The court used a variety of phrases, such as "central religious concepts," "the claims must be rooted in religious beliefs," and "this command is fundamental to the Amish faith" (emphasis added). *Ibid.* at 210, 215.

78. *Ibid.* at 234.

79. *Ibid.* at 235-36. The cases listed in n. 88 below involved application of the *Yoder* analysis. See also the Iowa cases discussed below.

any other county. The children are tested annually, and individual scores are examined to determine whether children are making progress. The educational program is meager. The teachers are noncertified members of the Amish or Mennonite community who have completed eighth grade. In many instances the schools are housed in the same buildings that served as the public school prior to reorganization.<sup>80</sup>

The Amish and Mennonite communities survive. There may be widespread confusion about the differences between the Old Order Amish and the Mennonites. The religious faith and practices of the two groups are closely related. The evidence presented in the *Fellowship Baptist Church v. Benton* case (1987) included an explanation of the differences by a person who had grown up in the large Amish-Mennonite settlement about fifteen miles southwest of Iowa City, in and around Kalona.<sup>81</sup> The theology or beliefs of the two groups is similar, but the Old Order Amish continue to live in the fashion described in detail in *Wisconsin v. Yoder*. One difference is the attitude about education. Mennonite children attend public schools, including high school; many go on to college, including denominational schools such as Goshen College in Indiana. The Mennonites do not resist state regulation; in fact there is a state-approved Mennonite high school in the Kalona area.<sup>82</sup> Even though the Mennonites and Old Order Amish live in the same communities, it was Old Order Amish who sought the exemption from attendance at public schools in the wake of reorganization requirements.

SINCE THE LATE 1970s, it has been mostly fundamentalist Baptists and those called home schoolers who have challenged

---

80. State of Iowa, Department of Education, *Report on Religious Groups Exempted from School Standards and the Compulsory Education Law* (1986-1987), 3-6. The Old Order Amish are often referred to as "house" Amish because they hold their church services in homes.

81. The testimony by Ned Miller is in volume 11 of the transcript of the trial in *Fellowship Baptist Church v. Benton*, discussed below.

82. The Iowa Mennonite School is among the approved non-public schools listed in the Iowa Educational Directory for the 1987-88 school year published by the Iowa Department of Education. The school has an estimated enrollment of 145 in grades nine through twelve.

Iowa's compulsory attendance law.<sup>83</sup> Bills to amend the law have been introduced repeatedly. Vigorous lobbying efforts by fundamentalist groups and those who wish to educate children at home failed until 1988 to produce statutory changes. The Iowa efforts are a part of a nationwide wave of challenges, often in cases with the same lawyers, the same witnesses, the same pleadings, the same issues.<sup>84</sup>

The first Iowa case, *State v. Moorhead* (1981), established that if a child of compulsory school age was not in public school, it is an affirmative defense for the parent to show at trial that the child was "receiving equivalent instruction by a certified teacher elsewhere." The court also said that section 299.1 of the Iowa Code was not vague, citing the educational standards section which lists the subjects that are required to be taught in Iowa public schools.<sup>85</sup>

The Charles City litigation followed. The parties stipulated the issues to be decided, at least fifty-eight issues, which the district court meticulously ruled on in an eighty-page order. The issues included definition of the term *school*, freedom of association and assembly, right of privacy, right to direct the education and upbringing of a child, self-incrimination, free exercise, establishment clause, overbreadth, vagueness, equal protection, and undue delegation. In addition, numerous statutory construction problems were considered. The trial took nine days in the fall of 1982. The judicial review of denial of the religious exemption by the State Board of Education was decided separately but in the same order as the other issues of the declaratory judgment action. The district court rejected each challenge to Iowa law.<sup>86</sup> An appeal followed but not on all the issues decided by the district court.

---

83. The court outlined the history of the challenge to state regulation by church schools in Maine in *Bangor Baptist Church v. State of Maine*, 576 F. Supp. 1299 (D. Maine 1983). Prior to 1979 the schools had been state approved. *Ibid.* at 1303.

84. The court acknowledged the identity of issues, witnesses, and counsel in *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 488 (8th Cir. 1987).

85. *State v. Moorhead*, 308 N.W.2d 60, 63, 64 (Iowa 1981).

86. *Johnson v. Charles City Community Schools Board of Education*, Floyd Co. Dist. Co. No. 22891. The ruling is a public record and is in the appendix to the case in the State of Iowa Law Library record of the case on appeal.



The Iowa Supreme Court's decision, *Johnson v. Charles City Com. Sch. Dist.* (1985), acknowledged Iowa's long tradition of friendly coexistence between private and public schools. It cited *Pierce* and other cases for the notion that the state has not only the authority but also the duty to impose reasonable regulations for the control and duration of basic education.<sup>87</sup> That decision was consistent with dozens of other cases that have been decided by courts in Nebraska, North Dakota, Michigan, and many other states. Such cases have upheld the requirement that children be taught by certified teachers. Until recently, few challenges have addressed specific requirements regarding the subject matter to be taught; most recent cases have been challenges to *any* regulation of private schools.<sup>88</sup>

The Iowa court interpreted the religious exemption narrowly in denying the plaintiffs' right to exemption from the compulsory attendance law. Unlike the Amish, who live in a separate agrarian society, the court found that the plaintiff's children would "live, compete for jobs, work, and move about in a diverse and complex society."<sup>89</sup> The United States Supreme Court refused to hear the application for review of the denial of the so-called Amish exemption.<sup>90</sup>

While the Charles City case worked its way through the state courts, another case, *Fellowship Baptist Church v. Benton*, was pending in the federal district court. It was brought by an association of twenty-two schools. By trial time, the named plaintiffs were two churches, pastors, instructors, parents, and children. The case was tried in September 1985, after the Iowa Supreme Court had decided *Charles City*. In most respects, the twelve-day trial was a rerun of the Charles City case, as Judge

---

87. *Johnson v. Charles City Com. Sch. Dist.*, 368 N.W.2d 74, 77, 79 (Iowa 1985), *cert. denied sub nom.*, 474 U.S. 1033 (1985).

88. See, for example, *State v. Patzer*, 382 N.W.2d 631 (N.D. 1986) *cert. denied*, 479 U.S. 825; *Sheridan Road Baptist v. Department of Education*, 396 N.W.2d 373 (Mich. 1986); *Attorney General v. Bailey*, 386 Mass. 367, 436 N.E.2d 139, *cert. denied*, 459 U.S. 970 (1982); *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Nebraska ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, appeal dismissed, 454 U.S. 803 (1981); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

89. *Charles City*, 368 N.W.2d at 83-84.

90. *Pruessner v. Benton*, 474 U.S. 1033.

William C. Stuart indicated in his decision. There were, however, three notable distinctions. First, the court found that the term *equivalent instruction* was unconstitutionally vague "without further definition." Second, statistical evidence was introduced concerning the results of investigations of child abuse. The legislature that spring had amended the statute to include teachers as mandatory child abuse reporters. The evidence showed that except for law enforcement personnel, certified school personnel have the highest percentage of "founded child abuse reports." Thus, a health and safety component was added to the compelling interest of the state in requiring children to be taught by certified teachers. Further, the importance of certified teachers as a means to identify children in need of special education was added to the list of interests served by the law.<sup>91</sup>

The plaintiffs appealed to the Court of Appeals for the Eighth Circuit; a cross appeal of the vagueness holding was filed; and the Keokuk school district cross appealed the denial of attorney fees. At the time of briefing and oral argument to the circuit court, the new department of education rules on equivalent instruction had taken effect.<sup>92</sup> The state and the school district argued that Judge Stuart's vagueness ruling was moot. In a very strongly worded decision, the circuit court affirmed the district court decision except that the denial of attorney fees was reversed and remanded. Granting of attorney fees to defendants is not a frequent occurrence, but the Eighth Circuit described the case against the Keokuk school district as "vexatious and unreasonable." The case was also remanded for a determination as to whether the new departmental rules had cured the vagueness of the statute.<sup>93</sup>

---

91. *Fellowship Baptist Church v. Benton*, 620 F. Supp. 308, 316, 318 (S.D. Iowa 1985). The mandatory child abuse reporting was acknowledged by the Eighth Circuit opinion on appeal. See *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 495 (8th Cir. 1987). Certified teachers were added to the class of persons who are mandatory child abuse reporters by 1985 Iowa Acts, ch. 173, §§ 3-5, codified as *Iowa Code* § 232.69(1) (b) (1987).

92. *Iowa Admin. Code* 670-63.1-.4 (1987); renumbered in 1988 to 281-31.1-.4 (1988).

93. *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 498-500 (8th Cir. 1987).

Judge Stuart's decision on remand echoed the *Pierce-Meyer-Yoder* doctrine. He ruled that the new regulations avoided the constitutional prohibition against vagueness but were not so extensive that the free exercise of religion was unduly burdened. The court found that "the new standards provide sufficient notice to private schools of how to comply with the minimum regulations and provide sufficiently explicit standards for those who enforce it."<sup>94</sup> Thus the Iowa law, as further defined by departmental rules, has passed all the constitutional tests that have been presented.<sup>95</sup>

An Iowa Supreme Court decision, *State v. Trucke* (1987), complicated the Iowa picture. During the period between the ruling that "equivalent education" was vague and the effective date of the new rules, Greg and Karen Trucke were convicted for failing to have their children taught by a certified teacher. A divided court ruled that the parents had not yet committed a crime and dismissed the charges. The decision meant that parents could not be prosecuted until the point was reached in a school year when children could not still be provided with 120 days of education. Put another way, parents could not be prosecuted under the *Trucke* ruling until after March 11, 1988, for the 1987-88 school year. This conclusion is based on the court's statement that "excluding weekends and holidays, the Truckes still had approximately 220 days left in the year to comply with the statute." In an exceptionally vigorous dissent, three justices said, "The compulsory education law is thus completely gutted." *Trucke*, however, was not a constitutional case; it was based on omission of an essential element of the crime from the charging instrument.<sup>96</sup>

What, then, is the existing reality with respect to compulsory attendance law in Iowa? The Iowa compulsory education law has been upheld against constitutional attacks, the one defect having been cured by rules. A statutory inter-

94. *Fellowship Baptist Church v. Benton*, 678 F. Supp. 213, 214 (S.D. Iowa 1988).

95. See *Johnson v. Charles City*; *State v. Moorhead*; and *Fellowship Baptist Church*, 620 F. Supp. 308, 815 F.2d 485, and 678 F. Supp. 213.

96. *State v. Trucke*, 410 N.W.2d 242-45 (Iowa 1987).

pretation increased the pressure on the legislature to amend the Iowa law.

The school census statute, a statute that preceded the attendance law, was repealed in 1986.<sup>97</sup> In repealing the school census statute requirement, the General Assembly did not delete the reference to the school census in the compulsory education law. Until 1931 the school census was taken annually; thereafter it was required every other year.<sup>98</sup> The school census had served two purposes since 1902: it facilitated planning, and it served as a tool for a school district to carry out its mandated responsibility to enforce the compulsory education law. A school district official could compare the school census list with the list of students enrolled in the public school and the list of students in reports received from private schools. From that comparison, it could be determined what children were *not* attending school as the first step in identifying children who were "apparently truant," and whose parents might be subject to prosecution.<sup>99</sup> The 1988 session of the legislature deleted the reference to the school census in the Iowa Code. Subsequently, school officers "shall ascertain the number of children over seven and under sixteen years of age, in their respective districts, the number of such children who do not attend school, and so far as possible the cause of the failure to attend." However, no mechanism is provided for implementing the duty to "ascertain" the number of such children.<sup>100</sup>

Without a school census the capability to identify all children in the district does not exist.<sup>101</sup> Admittedly, a biennial census becomes outdated, although it is better than nothing. There are concerns lurking in the background: How do school districts

---

97. 1986 Iowa Acts, ch. 1016, § 8, repealed *Iowa Code Supp.* § 291.9 (1985). The original school census statute is in *Iowa Code* § 2764 (1897).

98. 1931 Iowa Acts, ch. 91, § 2, changed the requirement from "each year" to "each even numbered year." Cf. *Iowa Code* § 291.9 (1985).

99. *Iowa Code* §§ 299.3, 299.11, 299.15 (1987).

100. 1988 Iowa Acts, ch. 1134, § 65.

101. State aid to Iowa schools is based on the number of students enrolled in school on the second Friday of September. *Iowa Code* § 442.4 (1987). A weighting system grants extra state aid for special education students, among others. *Iowa Code* §§ 442.7-.54 (1987). The school aid formula was substantially altered by the 1989 General Assembly.

plan? How do they project future enrollment? How do they enforce compulsory education? How can the State of Iowa meet its contractual obligations with the federal government to provide special education for all children in need of a "free appropriate special education"?<sup>102</sup> What about future lawsuits by children, when they reach majority, based on the failure of the school district to see that the child has been provided with education, a liberty and property interest?<sup>103</sup>

The church schools in Charles City, Keokuk, and Marshalltown that lost the cases discussed above continue to operate. "Homeschooler" organizations claim that hundreds of families in Iowa are educating children at home. No one knows how many Iowa children are not receiving education of any kind. No one knows how many children receive only marginal education. Improved standards for public schools are adopted.<sup>104</sup> Higher pay is granted teachers.<sup>105</sup> But the benefits of those changes are for the children whose parents cause them to attend public school or approved private schools.

Since *Yoder* was decided, the United States Supreme Court has refused to hear dozens of cases that challenge state compulsory education laws, including laws that are stricter than Iowa's.<sup>106</sup> No compulsory education cases have been decided by the Iowa Supreme Court since *Trucke*. Only one appeal of such a case is pending as of June 1, 1989.<sup>107</sup> Consti-

---

102. 20 U.S.C. § 1412(1).

103. The U.S. Supreme Court has said that "denial of education to some isolated groups of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982). The lack of knowledge of the existence of children who are not attending school for any reason and the lack of enforcement of compulsory education laws has the same effect for children as the Texas law at issue in *Plyler*, which kept undocumented alien children out of Texas schools.

104. 1986 Iowa Acts, ch. 1245, § 1411.

105. 1987 Iowa Acts, ch. 224.

106. See nn. 58 and 88 above.

107. Pursuant to *Iowa Code* § 13.2(1) (1987), all appellate cases in which the State of Iowa is a party are handled by the Office of the Iowa Attorney General. This statement is made pursuant to cases on the docket of the Attorney General in May 1989. On May 17, 1989, the Iowa Supreme Court did decide, for the first time, that the compulsory education law is not the only

tutional challenges have been defeated. The compelling question continues to be: How many Iowa children are *not* being educated? We do not know.

## EPILOGUE

THE IOWA GENERAL ASSEMBLY, in the final days of the 1988 session, amended the compulsory education law. A new paragraph was added to section 299.1 of the Iowa Code in apparent response to the *State v. Trucke* decision. As before, the required period of attendance for children of compulsory school age was at least 120 days each school year; the amendment provided that the "requirement shall be met by attending for at least thirty days each school quarter, or a similar distribution of attendance throughout the school year." The reporting requirements for parents who place a child under "private instruction" were expanded to include an outline of the course of study, including weekly lesson plans, tests used, the name and address of the instructor, and time spent on the different areas of curriculum. The penalty for violation of the law was reduced to "not more than forty hours of unpaid community service instead of any fine or imprisonment." Prosecutions of violators were deferred "until after July 1, 1989, unless the parent, guardian, or custodian fails to meet the requirements of sec-

---

available process for taking action against parents who do not send their children to school. The court ruled, in the case, *In the Interest of B.B. v. the State of Iowa, No. 88-1348* (Iowa 1989), that a child was in need of assistance because the parents had failed to exercise a reasonable degree of care in supervising the child as provided by Iowa Code section 232.2(6)(c)(2)(1987). That section appears in the chapter of the Iowa Code that is commonly known as the CHINA law. The child, who had been identified as a child in need of special education, had been kept home from school for most of three years. The parents claimed illness, but the court found no medical evidence that would support such an extended absence, and the parents had not sought a health exemption as provided by law. The case is important for a number of reasons, including the identification of education as a factor to be considered in determining what is in the best interest of a child. Further, CHINA is not a criminal statute, so the court may construct a variety of remedies that range up to removing a child from the custody of parents. What impact the new decision will have on the efforts of school officials to make certain that children of compulsory school age will attend school is difficult to predict. It is clear, however, that the decision marks a major change in Iowa law.

tion 299.4" (the reporting requirements outlined above; emphasis added). Finally, the Iowa legislative council was requested to establish an interim study committee to conduct a comprehensive study of the existing compulsory education law and to develop recommendations to submit to the 1989 General Assembly. The legislation was publicized generally as a "moratorium" on all enforcement of the compulsory education law even though it was not a total ban on prosecutions.<sup>108</sup>

The partial moratorium expired July 1, 1989. The 1989 General Assembly did not further amend the compulsory education law. Given the policy that requires strict construction of criminal statutes, the 1988 amendments may have created new problems, aside from the temporary and partially deferred prosecutions.<sup>109</sup> For example, the language in the law that parents "shall *cause* the child to attend," was changed to "shall *enroll* the child in some public school."<sup>110</sup> That change in the law may produce an issue of whether it is the child rather than the parent who is subject to prosecution. It is clear that consideration of compulsory education law is not over in Iowa.

---

108. 1988 Iowa Acts, ch. 1259.

109. For the requirement for strict construction of criminal statutes, see, for example, *State v. Oldfather*, 306 N.W.2d 760, 764 (Iowa 1981).

110. Cf. the first sentence of *Iowa Code* § 299.1 (1987), and 1988 Iowa Acts, ch. 1259 (emphasis added).

Copyright of Annals of Iowa is the property of State of Iowa, by & through the State Historical Society of Iowa and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.