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THE STATUS OF THE CATHOLIC OR PRIVATE SCHOOL IN LAW

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The wise man is the one who has built his house upon rock. The rain fell and the floods came and the winds blew and beat upon the house, but it did not fall. It was founded on rock.

FOR US THE WISE MAN in this parable of Our Lord is the alert educator who builds his parochial school on a solid, legal foundation. Impassioned attacks and legal restraints will beat against the school, but it will not fall. It is established on a sound juridical basis.

No educator today is so naive as to be blind to the necessity of a firm legal status for parochial schools, but not all understand the nature of the foundation. I therefore propose to draw a blueprint of the legal foundation of our schools, to specify its ingredients and the reinforcement that will assure its strength.

Pierce v. Society of Sisters,[1] the famous Oregon school decision of 1925, is the classic case which discloses the nature of the legal foundation of the right to educate. There is, however, some confusion as to whether the Supreme Court of the United States, in this historic decision, merely upheld the *property interest* which the schools possessed, or whether as a *matter of law* it also recognized the constitutional *right of parents* to determine the character of their children's education. This point is crucial because these are rights of a different order.

Few court decisions stand alone. They must be understood in terms of their historical background and related cases. The Oregon case is not an exception. Prior to this decision, the Supreme Court passed on the constitutionality of a law enacted in Nebraska.[2] This law provided that no foreign language could be taught in the non-public schools of the state. It was enacted in an atmosphere of hostility to private schools – the same Legislature having come within one vote of adopting a law which would have forced all children to attend public schools. Only the introduction of a bill to regulate private and parochial schools prevented legislation which would have in effect eliminated all private educational institutions. The law was challenged in the courts of Nebraska. The

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[1] 268 U.S. 510 (1925).

[2] Meyer v. Nebraska, 262 U.S. 390 (1923).

Supreme Court of Nebraska upheld the constitutionality of the law, and an appeal was taken directly to the Supreme Court of the United States. An examination of the National Catholic Welfare Conference files has disclosed many of the original documents filed in the Nebraska case. Among them was a private reporter's transcript of the oral argument of Mr. Mullen, the attorney for the Plaintiff. This document casts new light on the origin and development of the right of parents to control the education of their children.

In the course of the oral argument an interesting colloquy took place between Mr. Mullen and Mr. Justice McReynolds. Mr. Mullen argued very forcefully that the Nebraska legislation involved more than a denial of the property right of the teachers. He indicated that in the last analysis the legislation was directed at the right of the parents to send their children to private schools. At this point Mr. Justice McReynolds interposed, saying:

> "How did they abolish private schools? Did the State prohibit private schools?"

Replying, Mr. Mullen observed:

> "I say, your Honor, that they could no more abolish private schools than they could —"

Mr. Justice McReynolds broke in:

> " I just wanted to see what you claim. What about the power of the State to require the children to attend the public schools? . . . You will admit that, will you not?"

Mr. Mullen's reply was clear and definitive:

> "I do not admit that. *I deny that a State can, by a majority of the legislature, require me to send my child to the public schools.*"

He then proceeded to develop the proposition that the parental right is within the liberty guaranteed by the Fourteenth Amendment. In conjunction with this argument, Mr. Mullen observed that there was a close connection between the exercise of the parental right and freedom of religion. In a colloquy with Chief Justice Taft, he argued that the liberty which is guaranteed by the Fourteenth Amendment includes religious freedom. Mr. Mullen, in taking this position, laid the basis for the eventual argument that the right to send children to parochial school rests not only on *parental right* but also upon *religious freedom.*

Paradoxically, the Justice who intimated that the state had a right to ban all private schools wrote the opinion for the Court invalidating the Nebraska statute. In the course of his opinion, he stated:

> [Plaintiff's] right . . . to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment.[3]

He observed collaterally that, among other rights, the Fourteenth Amendment includes the right to the free exercise of one's religion. Admittedly, this was not the primary basis for the decision. It rested on the *property right* of the teacher and the *right of parents* whose children attended the schools in question. Nevertheless, this was the first time in the history of the Supreme Court that the parental right to educate was even obliquely associated with religious freedom. It was a decision that broke new ground and provided a fertile field for the growth of principles establishing the right to educate.

The comment of Arthur Mullen on the decision of the Court is significant:

> While the language prohibition was the direct question involved, other important personal rights have been passed on and established. This decision means that freedom

[3] *Id.* at 400.

> of religion, freedom of speech, the right to maintain private education institutions and the right of the parent to the control of his children even as against the state, are protected by the provision of the Fourteenth Amendment from unlawful state action.

The Court's recognition of the parental right and its association of religious liberty with this right represented a tremendous victory, for at the time of this decision private education had its back to the wall. Nineteen states had adopted legislation similar to the Nebraska law. Others were considering or had passed laws banning all private schools, and these laws were not merely the handiwork of a group of legislators. Through initiatives and referenda the people themselves were waging a war against private schools. The decision of the Supreme Court in the Nebraska case was the beginning of the end of this movement.

The Nebraska case had an immediate impact on the now famous Oregon school case.[4] The Oregon law required that all children attend public schools. It was challenged and was soon before the United States Supreme Court. Attorneys for the State and the Masonic Order (Scottish Rite) argued that the control of the education of children is within the power of the State, and therefore it could outlaw all private schools if it determined that such action was advisable and necessary for the promotion of the public welfare. In this particular instance, public welfare was equated with educational efficiency and cultural orthodoxy.

In a unanimous opinion, the Supreme Court invalidated the law. Mr. Justice McReynolds, speaking for the Court, stated:

> Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instructions from public teachers only.[5]

Continuing, the Court further held that the schools suffered an unwarranted destruction of their property contrary to the property guarantee of the Fourteenth Amendment.

Obviously, the Nebraska and Oregon decisions are so interrelated that they should be read as companion cases, jointly establishing the right of parents to control the education of their children. Both cases admittedly involved property rights but the Court and the attorneys treated these factors as secondary to the basic liberty of parents – the cornerstone of the legal foundation of the whole private school system.

Within a few years, another important case was before the High Court, namely *Farrington v. Tokushige.*[6] It involved the constitutionality of legislation enacted by the Legislature of Hawaii which severely regulated Japanese language schools, practically to the point of extinction. Attorneys for the plaintiff conceded the right to enact reasonable regulations, but contended that the regulatory legislation in this instance was so broad that it deprived parents of the right to educate, contrary to the due process clause of the Fifth Amendment.

The Supreme Court agreed, and observed that the legislation would place the schools under strict governmental control for which the record disclosed no adequate reason. It then stated that:

> The general doctrine touching rights guaranteed by the Fourteenth Amendment to

[4] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[5] *Id.* at 534.

[6] 273 U.S. 284 (1927).

> owners, parents and children in respect of attendance upon schools has been announced in [the] recent [*Meyer* and *Pierce*] opinions.[7]

The Court then concluded that the Fifth Amendment rights were the same as those of the Fourteenth, and that there was clearly a violation of these rights.

This little-known decision is extremely important, for it holds that there are definite constitutional limits on the power to regulate; even though the state strongly asserts that such regulation is necessary to promote educational welfare.

Over the next ten years a constitutional revolution took place. At the time of the Hawaiian case the Bill of Rights was considered to be binding only on the federal government. Thus an aggrieved party could not rely on the first ten amendments to the Constitution in an effort to curb discriminatory state practices. He was forced to rely on the more generalized provisions of the Fourteenth Amendment rather than the specific guarantees of the Bill of Rights. In a series of historic cases, the Court decreed that the basic principles inherent in the Bill of Rights were binding on states as well as the federal government. In the case of *Palko v. Connecticut,*[8] the Court adopted the proposition that:

> . . . [I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[9]

In another series of cases, involving Jehovah's Witnesses, the Court firmly established the principle that the religious liberty clause of the First Amendment applies to action by the states or their subdivisions. The extension of this principle to parochial schools was a natural and easy one. It had been anticipated as early as the Nebraska case, where it was argued that the right to send children to parochial schools is an exercise of religious freedom. More recently, Professor Corwin, one of the outstanding authorities on constitutional law, has stated:

> . . . [T]he parental right which was vindicated in the *Pierce* case, whatever else it is, must also be reckoned to be an *element of the right which the Constitution guarantees to all to "the free exercise" of their religion.*[10]

Even in the much criticized dissent of Mr. Justice Rutledge in the *Everson* case[11] the proposition was affirmed that the right to send children to religious schools, where daily religious education is *commingled* with secular subjects, is within the comprehensive guarantee of the freedom of religion clause of the First Amendment and enjoys all of the protection which has been provided for First Amendment freedoms.[12] There has been no respectable deviation from this proposition.

The significance of the change of emphasis from the Fourteenth to the First

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[7] Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927).

[8] 302 U.S. 319 (1937).

[9] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

[10] Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROB. 3, 20 (1949).

[11] Everson v. Board of Educ., 330 U.S. 1, 28 (1947) (dissenting opinion).

[12] "For the protective purposes of this phase of the basic freedom, street preaching, orai or by distribution of literature, has been given 'the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits.' And on this basis parents have been held entitled to send their children to private, religious schools. *Pierce v. Society of Sisters,* 268 U.S. 510. Accordingly, daily religious education commingled with secular is 'religion' within the guaranty's comprehensive scope." *Id.* at 32-33.

Amendment cannot be underestimated. For example, the Supreme Court, during the last decade, has consistently held that the test of legislation which conflicts with the First Amendment is much more definite than the test when only a Fourteenth Amendment right is involved. Much of the vagueness and generality of the due process clause of the Fourteenth Amendment disappears when the specific provisions of the First Amendment are applied as a standard. One of the best expositions of the difference between a Fourteenth Amendment and a First Amendment right is contained in the following excerpt from the opinion of the Supreme Court in *Board of Education v. Barnette.*[13] There the Court observed that:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.[14]

In other words, rights which depend exclusively upon the Fourteenth Amendment are much more vulnerable to state infringement than those protected by the specific guarantees of the First Amendment.

This admittedly is a big dose of law. As a matter of fact, it is a synthesis of a whole constitutional revolution, the ultimate implications of which have yet to be fully evaluated; however, it is clear that as a result of this development the status of parochial schools is stronger and more secure today than at any other time in their history. The reinforcing rods of the First Amendment have given a new strength and resiliency to the foundation on which the parochial school system rests. The significance of this factor is readily apparent when we apply it to particular cases affecting our schools. Take, for example, the field of regulation of non-public schools. There is no question about the right of the State, which has a secondary interest in education, to insist upon regulatory measures to guard the health and safety of children. The reporting of attendance and similar information may likewise be demanded. Unfortunately, today there is a tendency to enact laws which go far beyond the area of legitimate regulation.

Currently there is a general movement to secure the adoption of comprehensive regulatory laws — spearheaded by the National Council of Chief State School Officers. Within the last few years, this organization held a series of workshops on this subject. It has taken the position that the State has the responsibility to adopt regulations providing for the licensing, chartering or approval of all non-public schools. Such regulatory legislation would be in the nature of prior approval of private schools. Recently the Office of Education issued a substantial document, *The State and the Non-Public Schools,* developing the extent to which non-public schools are subject to regulation. This study was made at the request of the Chief State School Officers, and undoubtedly will stimulate further consideration of the problem.

This movement may be attributed to several factors. Many fly-by-night schools

[13] 319 U.S. 624 (1943).

[14] Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

grew up as a result of the "G.I. Bill" legislation. Also, the practice of regulating schools has evolved against the background of the Fourteenth Amendment. Thus the State only had to demonstrate that it had a rational basis for its legislation, which naturally resulted in the enactment of broad regulatory laws. Moreover, no serious attempt was made to distinguish between fly-by-night schools and our parochial schools, which the Church subjects to supervision in order to maintain the acceptable school demanded by the Encyclical on Education and by the Third Council of Baltimore.

Indiscriminate application of school regulations must cease, for our parochial schools, which are protected by the First Amendment, may only be regulated in accordance with standards acceptable under this amendment. Let us now examine the delimitations of the First Amendment.

An analysis of Supreme Court decisions applying the freedom of religion clause to state action discloses that ordinances and statutes which impose prior restraints on religion are invariably held to be unconstitutional. Such laws requiring licensing or other forms of *prior approval* of religious activities have been uniformly condemned. This attitude has prevailed even when there was an intermingling of religious and secular activities.[15] It may, therefore, be asserted that state regulatory laws which require a parochial school to secure prior approval from public officials before it may open its doors is contrary to settled constitutional law. On the other hand, the State may adopt certain minimal standards relating to the health and safety of school children and then proceed to take appropriate action if school authorities without cause refuse to adhere to such standards. This approach which is based on the occurrence of subsequent events does not have the vitiating characteristic of prior restraints.

Finally, these minimal standards must be specifically set forth in law. For example, legislation which places regulatory power within the absolute control and discretion of state school officials is constitutionally vulnerable for it gives the Superintendent of Education or the State School Board arbitrary power over the life and death of private schools.[16]

In summary, it is submitted that state regulation of parochial schools:

1. must have a grave justification;
2. may not involve the formula of prior approval; and
3. must be based on clear legislative standards.

These conclusions stem primarily from the First Amendment and demonstrate the necessity of acquiring a thorough knowledge of its educational implications. With such knowledge, comprehensive regulatory laws which contain any of the above objectionable characteristics may more effectively be opposed or, alternatively, an exemption may be requested for all parochial schools. Precedent for this action may be found in a general exemption of parochial schools from broad regulatory legislation in the states of Maryland and New York.

In addition to the threat of excessive regulation and supervision, our schools are confronted with another oblique attack through the medium of zoning legislation. The rapid growth of suburbs has developed a trend which goes far beyond the original concept of zoning-out commercial estab-

[15] See Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943).

[16] School Dist. v. Decker, 159 Neb. 693, 68 N.W. 2d 354 (1955).

lishments; on the contrary, it would prevent private schools from being established in residential areas. Here again a knowledge of the extent of the legal foundation of our schools is essential. Two important cases graphically demonstrate this point. In the first case,[17] a Milwaukee suburb adopted an ordinance which permitted the building of public and private elementary schools in Zone A, but on the high school level permited only public schools. Representatives of the Lutheran Church requested a permit to erect a high school in Zone A. The building inspector declined, and an action was brought to force him to grant the necessary permit. The lower court, acting in harmony with existing legal authority, directed the issuance of the building permit; but was reversed by the Supreme Court of the State which admitted that public and private schools would impose the same burdens on the community, but declared:

> Whether the private school is sectarian or commercial, . . . it discriminates and the public school does not. The private school . . . does not compensate the community in the same manner or to the same extent.[18]

The court thereupon concluded that since the private school does not make the same contribution to the public welfare of the community, such a difference could be taken into consideration by the legislative body in framing its ordinance. Unfortunately, the attorney relied exclusively on the reasonableness of the classification under the Fourteenth Amendment. No reliance was placed on the parental right under the Fourteenth Amendment or on freedom of religion under the First Amendment, with the result that the court experienced little difficulty in rendering an adverse opinion. The school was not built.

A year later a similar case arose in California. The City of Piedmont adopted an ordinance which prohibited the building of any but public schools in the residential zone. An application was made for a permit to build a Catholic parochial school but it was denied on the basis of the zoning restriction. Since this zone comprises 98% of the area of the community, this had the practical effect of excluding private schools from the whole City of Piedmont. The action of the building inspector was challenged in the District Court of Appeals by the Roman Catholic Welfare Corporation of San Francisco. Argument was not confined to a denial of equal protection of the law. It was asserted positively that the ordinance deprived parents of rights guaranteed by the liberty clause of the Fourteenth Amendment. This realistic position resulted in a favorable decision. The court declared:

> It is settled that parents have the basic constitutional right to have their children educated in schools of their own choice. . . . Having this basic right . . . no reasonable ground for permitting public schools to be constructed in Zone A and prohibiting all other schools teaching the same subjects to the same age groups can be suggested.[19]

Arguments presented to the Supreme Court of California on appeal included reliance on the First as well as the Fourteenth Amendment. For example, the plaintiff cited a decision of the United States Supreme Court[20] holding that freedom of religion has a higher dignity under the Constitution than municipal or personal convenience. The citation of this and other First Amendment cases materially strengthened the position

[17] State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W. 2d 43 (1954).

[18] *Id.* at 47.

[19] Roman Catholic Welfare Corp. v. City of Piedmont, 278 P.2d 943, 944 (Cal. App. 1955).

[20] Martin v. Struthers, 319 U.S. 141, 151 (1943).

of the school with the result that the Supreme Court of California affirmed the decision of the lower court.[21]

Some zoning ordinances stop short of absolute prohibition, but make the right to erect a non-public school contingent on the vote of the community. The best answer to this type of an ordinance is the language of the Supreme Court in *Board of Education v. Barnette*:[22]

> One's right to . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[23]

The more common of the objectionable zoning ordinances places unlimited discretion in the planning board to determine whether a parochial school may be erected. This type of an ordinance was the subject of review in the case of *Diocese of Rochester v. Planning Board.* The facts in this New York case disclosed that the Planning Board had rejected the application to build a parochial school. The lower courts upheld the Planning Board.[24] The New York Court of Appeals reversed, directing that a permit be issued on the grounds that plaintiffs had been deprived of their right to the free exercise of religion and their right to impart and receive religious instruction and education.[25]

The timeliness of and necessity for this reappraisal of the right to educate is emphasized by current developments — storm warnings which serve notice of movements to undermine the very foundation of our schools. In California, the people will soon vote on a referendum designed to take away tax exempt status from our parochial schools; in North Carolina[26] and South Dakota,[27] dangerous regulatory legislation has been enacted; in Oregon, the free school book law[28] will soon be the subject of litigation designed to secure a reversal of the Supreme Court decision in the *Cochran* case.[29] A few months ago, the Masonic Order (Scottish Rite) in Oregon distributed a document to the public school teachers of the State, which asserted that:

> (parochial) schools do not serve a public purpose so as to deserve public support under a welfare theory for they teach not only religion, but governmental doctrines that are foreign and contrary to the American concepts of government.

There is an interesting coincidence about this latest Masonic statement. In 1922, Father Flood, Superintendent of Schools for the Archdiocese of Philadelphia, commenting on a similar position of the Masonic Order, addressed the National Catholic Education Association Convention in Philadelphia. He stated:

> In our own country there is a growing tendency to regard the Church as an intruder in the field of education . . . on the absurd theory that the child belongs *primarily* to the State and only *secondarily* to the parents.

Though our courts have consistently condemned this inversion of rights, this statist concept still has powerful support. It is necessary therefore to reassert the principle that parents have the prior right to educate — a right which has been broadened and strengthened through its recognition as a First Amendment freedom.

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[21] Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal.2d 325, 289 P.2d 438 (1955).

[22] 319 U.S. 624 (1943).

[23] Board of Educ. v. Barnette, 319 U.S. 614, 638 (1943).

[24] Diocese v. Planning Bd., 207 Misc. 1021, 141 N.Y.S.2d 487 (Sup. Ct.), *aff'd,* 1 A.D.2d 86, 147 N.Y.S.2d 392 (4th Dep't 1955).

[25] Diocese v. Planning Bd., 1 N.Y.2d 508, 136 N.E.2d 827 (1956).

[26] See N.C. GEN. STAT. §§115-255 to -57 (1957).

[27] See S.D. CODE §15.3202(2) (Supp. 1952).

[28] See ORE. REV. STAT. §328.520 (1958).

[29] Cochran v. Board of Educ., 281 U.S. 370 (1930).