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EQUAL JUSTICE UNDER LAW—

Tax Aid to Education

WILLIAM J. KENEALY, S.J.*

THE CURRENT CONTROVERSY over federal aid to education has unfortunately obscured the real issues in many minds. Some sincere people seem to think it is a theological dispute between Protestants and Catholics, or Jews and Christians, or believers and unbelievers. Others seem to consider it a philosophical debate between secular and religious theories of education. It is neither. At least it should be neither. Catholics and Protestants, Jews and secularists are deployed on both sides of the controversy. Moreover, we have no federal theology, and no federal philosophy of education. Religion is mentioned in the Constitution only to guarantee it freedom, and education is not mentioned in the Constitution at all. The current controversy is a political argument in which, it seems to me, there are three substantial issues and one constitutional difficulty. The three substantial issues are the general welfare of the nation, the practical freedom of parental choice in education, and the equitable distribution of tax benefits to all school children without discrimination. The constitutional difficulty is created by the highly controverted interpretation of the establishment of religion clause of the first amendment to the Constitution, announced for the first time in 1947 by the Supreme Court.¹

General Welfare

The only constitutional justification for any federal aid to education is the power given to the Congress by the first clause of article I, section 8, of the Constitution, to provide for the "general welfare of the United States." From the foundation of the nation there were sharp differences of opinion as to the meaning of the general welfare clause. James Madison insisted that it amounted to no more than an introduction or reference

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¹ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

to the specific powers enumerated in the following clauses of the same section.² Alexander Hamilton, however, argued that the general welfare clause conferred a separate power distinct from those later enumerated.³ Joseph Story, in his justly celebrated *Commentaries on the Constitution*, espoused the Hamiltonian position.⁴ But the question was not settled for almost a century and a half. In 1936, *United States v. Butler*⁵ invalidated the Agricultural Adjustment Act of 1933, but in the opinion the Supreme Court expressly rejected the Madison view, and explicitly adopted the Hamilton-Story opinion that the general welfare clause is a separate grant of power, distinct from those later enumerated, not to regulate, but to tax and spend for the general welfare of the nation. A year later, in 1937, the case of *Steward Machine Company v. Davis*⁶ upheld the Social Security Act of 1935 as a legitimate exercise of this separate general welfare power. Since then the power has never been seriously challenged. And nobody, I suppose, would seriously challenge the fact that the nation's welfare depends in great part upon the education of the nation's children. Federal aid to education is unquestionably constitutional. Therefore, if the Congress determines to exercise its legislative discretion to provide for the general welfare by aiding education, it seems to me that the most important issue is this: would the general welfare of the nation be better promoted by aiding the education of some of our children, while ignoring others, or would it be

better promoted by aiding the education of all our children? It would seem reasonable to hold that, if the general welfare would be promoted by aiding some, it would be better promoted by aiding all. In any event, the critical question is: how would the general welfare of the nation be better served? This is the main issue. It should not be obscured. And it should not be shouted down.

Parental Freedom

There are other important issues too. One of them is the difficult problem of providing more practical freedom of parental choice in education. The Supreme Court in the *Oregon School Case*⁷ of 1925 unanimously held that "due process of law" necessarily implied the fundamental constitutional right of parents, subject to reasonable state standards and regulations, to choose the education of their own children, whether it shall be public or private, secular or religious. Freedom of and from religion, and freedom of educational philosophy, are simply parts or elements of this fundamental parental right of free choice in their children's education.

This is not a constitutional right of the Catholic Church or of any other church, or of any school system, public or private, secular or religious. Churches and school systems do not produce children or pay taxes. The right is parental. A state may compel a child to attend an accredited school of his parents' choice. It may not deny or unreasonably restrict the freedom of that parental choice.

Fundamental rights, obviously, should

² THE FEDERALIST No. 41, at 282-83 (Law Classics Library 1901) (Madison).

³ 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §978 (2d ed. 1851).

⁴ 1 STORY, *op. cit. supra* note 3, §§976-91.

⁵ 297 U.S. 1 (1936).

⁶ 301 U.S. 548 (1937).

⁷ 268 U.S. 510 (1925).

not be mere academic abstractions or sterile legal concepts. "To secure these rights," in the practical context of life, "governments are instituted among men." Yet when government taxes all parents for the support of a school system which satisfies the free choice of some parents only, and denies all support to parents whose consciences dictate otherwise, can it truly be said to "secure" this freedom of parental choice in the practical context of life? Does not such a plan of taxation and disbursement create, by law, a positive economic impediment to the practical freedom of parents who, taxed for the free choice of others, cannot afford to pay again for their own? And especially when their own free choice is not a matter of eccentricity, and not merely a matter of taste, but a matter of respectable educational philosophy, and particularly a matter of conscience?

This may not be a serious problem for the wealthy. It may not entail great sacrifice for the well-to-do. But for the poor, unless rescued by private charity, it is the public and effectual destruction of free choice in the practical context of life. For very many poor parents, the fundamental constitutional right of free choice in the education of their children is indeed a mere academic abstraction, a sterile legal concept, and a practical mockery. How long can such a "securing" of freedom commend itself to the spirit of liberty, the sense of fairness, and the boasted magnanimity of our people? The critical question here is: would federal aid to all, involving no unequal tax burden on any, promote a more genuine freedom of parental choice in the practical context of life? This is the second important issue. This too should not be obscured. And it too should not be shouted down.

Equal Protection

The third important issue, it seems to me, is the equitable distribution of tax benefits to all our school children without discrimination. The core of the concept of justice is equality. Justice cannot be explained without equality. "Equal Justice Under Law" is the proud ideal cut deeply into the gleaming white marble over the entrance to our Supreme Court in Washington. Fundamental equality is implied in the due process clauses of the fifth and fourteenth amendments, and is expressed in the equal protection clause of the fourteenth. Yet, after a century and a half of constitutional history, we have only recently entered what might aptly be called "the age of equal protection." The *School Segregation Case*⁸ of 1954 and subsequent supporting decisions have demonstrated the humility and the courage of the Supreme Court in reversing previous error in pursuit of "Equal Justice Under Law."

We are no longer blind to all the terrible inequalities of the bitter past. We have caught a glimpse, at least, of a better future. We have fixed our eyes and set our hearts upon the glorious goal of practical equality for all our racial and religious, ethnic and political minorities. Should we, then, exclude from our ideal of equal protection and treatment the school children of the country — who constitute the most voiceless, voteless, and unorganized minority in the land?

It is not without significance that the same clause of the Constitution, which grants Congress power to provide for the general welfare, also empowers it to "provide for the common defense."⁹ Welfare

⁸ 347 U.S. 483 (1954).

⁹ U.S. CONST. art. I, §8.

and defense are obviously and substantially interdependent. Do they have differing relationships to our school children, or to some of them? Is there any reasonable ground for distinguishing between summoning them all some day to the common defense, and aiding them all now for the general welfare, upon which the defense may well depend? The critical question here is: would the ideal of equal protection and treatment of children be better attained by aiding the education of some only, or would it be better attained by aiding the education of all without discrimination? This is the third important issue. This too should not be obscured. And this too should not be shouted down.

Constitutionality

The general welfare, the practical freedom of parental choice in education, and the equal treatment of school children without discrimination, are the three main issues in the current controversy. There remains the constitutional difficulty. Some admit that the general welfare, parental freedom, and equal treatment demand federal aid for all school children, but insist that unfortunately it cannot be granted. Disliking a partial promotion of the general welfare, sympathizing with parents too poor to be free, and feeling sorry for children excluded from the common care, they think the situation is hopeless because of the Supreme Court's interpretation of the establishment of religion clause of the first amendment, enunciated for the first time in the *Everson Bus Case*¹⁰ of 1947.

Constitutional law scholars, however, differ over the hopelessness of the situation. Some substantial scholars consider the in-

terpretation a gratuitous *obiter dictum* not necessarily determinative of future cases. Others are convinced that, *obiter dictum* or not, the interpretation is simply wrong; that it should be, and eventually will be, distinguished or repudiated.

The establishment clause has been before the Court only three times in its entire history: the *Everson Bus Case*¹¹ in 1947, the *McCullum Released Time Case*¹² in 1948, and the *Zorach Released Time Case*¹³ in 1952. In only one of these three cases did the Court find what it interpreted to be an "establishment" of religion. In *McCullum* the Court decided that an Illinois plan, which provided for compulsory religious instruction at parental request inside public school buildings, was an establishment of religion. But in *Zorach* the Court decided that the New York City plan, which provided for compulsory religious instruction at parental request outside public school buildings, was not. In both plans the religious instruction requested by the parents was made compulsory by law. In neither plan, however, was there an expenditure of public funds for the religious instruction involved.

The *Everson Bus Case* is the only one dealing with an expenditure of public funds as an alleged establishment of religion. The Court decided that it was not an establishment for a New Jersey township, pursuant to a state statute, to reimburse parents for money expended by them for bus transportation of their children to and from parochial schools. Since public school children were transported to and from school at public expense, the Court upheld the

¹¹ *Ibid.*

¹² 333 U.S. 203 (1948).

¹³ 343 U.S. 306 (1952).

¹⁰ 330 U.S. 1 (1947).

New Jersey reimbursement statute as a public welfare measure designed "to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."¹⁴ The statute promoted the public welfare, fostered freedom of parental choice, and treated all children equitably without discrimination. The decision of the Court was that such a law does not amount to an establishment of religion.

However, in arriving at this decision, the Court's opinion enunciated this highly controverted interpretation of the establishment clause:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."¹⁵

Despite this sweeping declaration, the Court upheld the New Jersey statute as a constitutional public welfare law — even though it obviously aided Catholic parents to get their children to parochial schools, which are institutions which teach the practice of religion, and hence indirectly aided the institutions themselves. In doing so, however, the Court expressly noted that: "The state contributes no money to the schools. It does not support them."¹⁶ The

opinion of the Court, written by Justice Black, concluded as follows:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.¹⁷

This is the interpretation of the establishment clause which raises the difficulty in promoting the general welfare, parental freedom, and equal treatment of children, by federal aid to the education of all school children without discrimination. I assume that it raises no difficulty concerning children who attend private secular schools. But it does raise a problem concerning children who study religion in addition to the secular subjects required and regulated by state law, that is, children who attend parochial schools.

Assuming *arguendo* that this much disputed interpretation of establishment is not mere obiter dictum, but that it pertains to the ratio decidendi of the case, I subscribe to the opinion of those who claim that it is simply wrong; that it should be, and eventually will be, distinguished or repudiated. I think it is wrong as a matter of history, as a matter of logic, and as a matter of judicial policy.

History

The interpretation is wrong as a matter of history. The first amendment contains two clauses concerning religion, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment and the free exercise clauses should be carefully distinguished. For the moment, I am concerned with the establishment

¹⁴ *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

¹⁵ *Id.* at 15-16.

¹⁶ *Id.* at 18.

¹⁷ *Ibid.*

clause alone. My thesis is that, according to the common understanding of the terms which prevailed among the thirteen original ratifying states, "an establishment of religion" meant any official preferment by law of one religion over another; and that, according to the same common understanding, the clause "Congress shall make no law respecting" any such officially preferred religion, was designed and intended to forestall the possibility that the Congress might attempt (1) to establish an officially preferred national religion to replace or compete with the then existing state religions, or (2) to establish, disestablish, or interfere in any way with the then existing state religions. That was the significance of the words "respecting an" establishment, federal or state.

Although the Constitution of 1789 gave the new federal government no express power over religion, there was considerable fear on the part of many that the new federal government might attempt to do some of these things under the guise of the implied powers contained in the necessary and proper clause of article I, section 8, of the Constitution. The establishment clause guarded against this possibility. It was an express declaration of a principle of federalism which guaranteed, as against federal interference, exclusive state power over religion. This seems clear from the history of the times.

For several years prior to the ratification of the Constitution in 1789, and the first amendment in 1791, a bitter struggle had been waged in several of the states against the locally established religions. In some of the states the fight for disestablishment had already been successful, as evidenced by the texts of their local constitutions. In Delaware, for instance, the constitution of

1776: "There shall be no establishment of any one religious sect in this State in preference to another." In New Jersey, the constitution of 1776: "There shall be no establishment of any one religious sect in this Province in preference to another." In North Carolina, the constitution of 1776: "There shall be no establishment of any one religious church or denomination in this State in preference to any other." In New York, the constitution of 1777 repealed "all laws which might be construed to establish or maintain any particular denomination of Christians or their ministers." Note the constant recurrence of "preference" as the significant characteristic of establishment in these solemn and public documents.

In other states the struggle for disestablishment was not yet successful. When the first amendment was ratified, at least four of the thirteen original states still retained officially preferred, that is, established religions: Vermont, Massachusetts, Connecticut and South Carolina. A typical establishment provision is found in the South Carolina constitution of 1778: "The Christian Protestant religion shall be deemed, and hereby is constituted and declared to be, the established religion of this State." I said that "at least four" of the ratifying states still retained officially established religions, because several other states had what might be called today "quasi-establishments." That is: while repudiating the establishment of any one officially preferred religion, and tolerating the free exercise of religion in private life, nevertheless they established certain public or civil disabilities based upon religious belief or worship.

North Carolina, for instance, in its constitution of 1776, while repudiating the

“establishment of any one religious church . . . in preference to any other,” nevertheless provided that only Protestants could hold state offices. And New Hampshire, in its constitution of 1784, while repudiating the “subordination of any one sect or denomination to another,” nevertheless provided that the profession of Protestantism should be a qualification for the offices of governor, state senator and representative, and empowered its legislature to authorize municipalities to support public Protestant teachers of piety, religion and morality. Unless this provision has been repealed recently, it is still in the constitution of New Hampshire — although, of course, as dead letter in view of both recent custom and the fourteenth amendment.

These state establishments and quasi-establishments persisted for many years after the ratification of the first amendment, which limited federal power only and guaranteed state power over religion. Vermont disestablished in 1807, Connecticut in 1818, and Massachusetts in 1833. But the quasi-establishments, that is, the civil disabilities based upon religious belief or worship, lasted many decades longer.

During the struggle against state establishments and quasi-establishments, there was a strong popular desire, on both sides of the fight, to keep the new and feared national government entirely out of it; to make sure that the new and feared Congress would not attempt to establish an officially preferred national religion to replace or compete with the then existing state religions; and to make sure that all legal power over religion would remain, where it had always been, exclusively in the states.

At the time of the ratification of the

Constitution in 1789, fear of the possible use of the necessary and proper clause led to the widespread popular demand for a Federal Bill of Rights. Although some, including James Madison, argued that, since the new federal government was one of limited and delegated powers, a specific Bill of Rights was unnecessary, nevertheless the popular demand led to the drafting and ratification of the first ten amendments in 1791.

With reference to religion in the proposed Bill of Rights, Rhode Island proposed that “no particular religious sect or society ought to be favored or established by law in preference to others.” New York proposed: “That the people have an equal, natural, and inalienable right freely and peaceably to exercise their religion, according to their conscience; and that no religious sect or society ought to be favored or established by law in preference to others.” Virginia proposed that “no particular religious sect or society ought to be favored or established by law in preference to others.” North Carolina, with its quasi-establishment of Protestantism, offered a proposal identical with Virginia’s. And New Hampshire, with its own quasi-establishment of Protestantism, proposed that: “Congress shall make no laws touching religion, or to infringe the rights of conscience.” This proposal, which came close to the formal text of the eventual amendment, evidenced New Hampshire’s desire to keep the Congress from touching its own particular quasi-establishment! But note, again the constant recurrence of “preference” as the significant characteristic of an establishment of religion. It seems fairly obvious that a law which would treat all religions alike, such as tax exemption of church property, would not be an

establishment, as the term was commonly understood in 1791. A fortiori, a law which would aid all school children alike would not be an establishment of religion.

James Madison submitted his own amendments to the House of Representatives on June 8, 1789. Two of his amendments, the fourth and fifth, dealt expressly with the subject of religion. His fourth amendment was to be inserted in Article I, Section 9, of the Constitution, following the necessary and proper clause of Section 8. Under the caption of "Limitations upon Powers of Congress," it read:

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

His fifth amendment was to be inserted in Article I, Section 10, of the Constitution. Under the caption of "Restrictions upon Powers of States," it read: "No State shall violate the equal rights of conscience. . . ."

It is evident that Madison distinguished three things: an establishment of religion, a quasi-establishment (civil disabilities based upon belief or worship), and the equal rights of conscience in private life. The "equal rights of conscience" he would protect against both sovereignties, national and state. But he would prohibit establishments and quasi-establishments to the nation only; he would allow the states to continue with them or do whatever they desired in the matter.

Madison's proposed restriction on the powers of the states, that "no state shall violate the equal rights of conscience," did not become part of the Constitution or the Bill of Rights. Sometimes called "The Lost Amendment," its failure emphasized

the desire and intention of the times to reserve all power over religion to the states.

During the debates on the drafting of the text of the first amendment, Madison explained that he believed "the people feared that one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." He thought that, "if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." The word "national" was not specifically introduced, apparently for two reasons: (1) to avoid the dispute then current as to whether the new central government was in fact a "national" or a federal government, a dispute which seven decades later erupted into the Civil War, and (2) to make it clear that the new central government had no power whatsoever over any establishment, national or state. Joseph Story, in his *Commentaries*, wrote that the purpose of the first amendment was "to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which would give to any hierarchy the exclusive patronage of the national government."¹⁸

The historical evidence seems conclusive that the establishment clause of the first amendment simply forbade a national establishment or quasi-establishment of religion. That is to say: it simply forbade the official preferment by federal law of one religion over others, and the setting up by federal law of civil disabilities based upon religious belief or worship. The second clause of the amendment, covering the free exercise of religion, obviously went further and prohibited the federal govern-

¹⁸ 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1877 (2d ed. 1851).

ment from interfering by law with religious belief and worship, that is, the rights of conscience even in private life. The two clauses together completely removed the matter of religion from federal competence, and left it within the exclusive competence of the states.

When the Bill of Rights was ratified, it was universally understood that its restrictions were limitations upon the federal government only. This was confirmed by the Supreme Court in 1833 in *Barron v. Mayor of Baltimore*,¹⁹ a case involving property rights and the fifth amendment. It was further confirmed by the Court in 1844 in *Permoli v. New Orleans*,²⁰ a case involving religious rights and the first amendment, and in which a unanimous Court declared:

The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States.²¹

The main historical point, however, is that an "establishment of religion" meant, to those who ratified the first amendment, the official preferment by law of one religion over others, or the establishment by law of civil disabilities based upon religious belief or worship. It meant then what it means today when we speak of the Established Church of England or the Established Religion of Spain. It did not forbid then, and it does not forbid now, the promotion of the nation's general welfare, the furtherance of parental freedom, or the equal treatment of children, by means of federal aid

to the education of all the nation's school children without discrimination or preference — including parochial school children who study secular subjects required by law, in schools regulated and accredited by law. Such aid does not prefer one religion over another. Nor does it create civil disabilities for any. It avoids disabilities and fosters freedom. As someone has put it: the Supreme Court may make history, it has no mandate to rewrite it.

Logic

The interpretation is wrong as a matter of logic. Following the Civil War, the fourteenth amendment in 1868 radically changed relationships between the federal and state governments. By that amendment the federal constitution, for the first time, provided that: "No state shall . . . deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." The *Permoli* and *Barron* cases thereby became obsolete. Not because the first and fifth amendments were changed, but because the fourteenth then empowered the federal courts, for the first time, to protect fundamental personal rights against state action. The personal rights so protected against state action are described in the amendment by the very general terms of life, liberty, property, and equal protection.

The generality of these terms, and the difficulty of specifying the particular personal rights embraced therein, engendered passionate controversies and instigated an enormous volume of constitutional litigation. The due process clause has already received long and extensive judicial attention, especially regarding property rights, whereas the equal protection clause is only

¹⁹ 10 U.S. (7 Pet.) 464 (1833).

²⁰ 15 U.S. (3 How.) 561 (1844).

²¹ *Id.* at 563.

beginning to come under comparable judicial scrutiny, notably in the *School Segregation Cases*²² of 1954.

However, it was settled as early as 1883, in the *Civil Rights Cases*,²³ that the fourteenth amendment protects personal rights against state action only. Moreover, it is also settled that the personal rights so protected do not include all the rights enumerated in the Bill of Rights — the right, for instance, to a jury trial in a civil suit involving more than twenty dollars! In a long series of constitutional cases, notably *Hurtado v. California*²⁴ in 1884, *Twining v. New Jersey*²⁵ in 1908, *Palko v. Connecticut*²⁶ in 1937, *Adamson v. California*²⁷ in 1947, and *Wolf v. Colorado*²⁸ in 1949, it became the settled doctrine of the Court that the fourteenth amendment protects against state action all and only all personal rights which are “implicit in the concept of ordered liberty,” without which “neither liberty nor justice could exist,” which are “so rooted in the traditions and conscience of our people as to be ranked as fundamental” and which correspond to “those canons of decency and fairness which express the notions of justice of English-speaking peoples.”

Accordingly, by a long and painstaking process of judicial “inclusion and exclusion,” many personal rights have been “ranked as fundamental,” and therefore protected in the fourteenth amendment against state action. Certainly, the free exercise of religion is one of these fundamental rights, and it was so held in *Hamilton*

*v. Board of Regents*²⁹ in 1934, and in the Jehovah Witness case of *Cantwell v. Connecticut*³⁰ in 1940. Obviously therefore, the official preferment by state law of one religion over others, the creation by state law of civil disabilities based upon religious belief or worship, and interference by state law with religious liberty in private life, are forbidden by the fourteenth amendment. They are forbidden, however, not because they are establishments or quasi-establishments of religion, but precisely because and in so far as they are interferences with the fundamental personal right of the “free exercise” of religion. In view of the historical meaning of establishment and quasi-establishment, I cannot conceive of one which would not interfere with the free exercise of religion. But the point is this: it is the free exercise of religion which is the fundamental personal right or liberty protected by the fourteenth amendment.

What, then, of an alleged establishment which does not in fact interfere with anyone’s free exercise of religion? It is a stranger to history. Or it was, at least, until the Supreme Court made the introduction in 1947. In the *Everson Bus Case* and the *McCullum and Zorach Released Time Cases*, there was no allegation or finding of any interference with anyone’s free exercise of religion. In all three cases, the Court was dealing with an alleged establishment which ironically made the free exercise of religion a more practical element in the fundamental parental right of educational control. And in all three cases, the Court appeared to consider this novel constitutional concept as though it had some historical basis. The Court appeared

²² 347 U.S. 483 (1954).

²³ 109 U.S. 3 (1883).

²⁴ 110 U.S. 516 (1884).

²⁵ 211 U.S. 78 (1908).

²⁶ 302 U.S. 319 (1937).

²⁷ 332 U.S. 46 (1947).

²⁸ 338 U.S. 25 (1949).

²⁹ 293 U.S. 245 (1934).

³⁰ 310 U.S. 296 (1940).

to consider that, even though New Jersey, Illinois, and New York, did not deprive anyone of the free exercise of religion, nevertheless in New Jersey and New York there might have been, and in Illinois there was, an establishment of religion in violation of personal liberty guaranteed by the fourteenth amendment.

The Court did not bother to elucidate the judicial metamorphosis whereby the first amendment guarantee of state power over religion became, in 1947, a denial of that same power in the fourteenth. The Court did not take the trouble to explain the judicial logic whereby a first amendment principle of federalism became, in 1947, a personal right in the fourteenth, and a fundamental one at that. For the fourteenth amendment protects only fundamental personal liberty and equality. But what personal liberty or equality is violated by an alleged establishment which actually promotes and fosters the free and equal exercise of religion by parents in controlling the education of their children? The liberty of the parents? The liberty of the children?

The *McCullum Case* held that religious instruction at parental request inside public school buildings in Illinois was an establishment; the *Zorach Case* held that religious instruction at parental request outside public school buildings in New York was not. Justice Jackson, in a rather bitter dissent in *Zorach*, complained about "pressuring children into religion," and wrote:

The distinction attempted between . . . [*McCullum* and *Zorach*] is trivial, almost to the point of cynicism, magnifying nonessential details and disparaging compulsion which was the underlying reason for invalidity. . . . The wall which the Court was professing to erect between Church and State has become

even more warped than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.³¹

I agree with Justice Jackson that the *inside-outside* distinction between *McCullum* and *Zorach* is trivial. And the Court itself has held in *Niemotko v. Maryland*³² in 1951, and in *Fowler v. Rhode Island*³³ in 1953, that religion may not be unreasonably barred or discriminated against on public property. But Justice Jackson's dissent is also open to criticism on the basis of logic. When he spoke of "compulsion" and of "pressuring children into religion," he must have known that the only compulsion or pressure involved was that which was freely requested by the parents involved. Surely he did not think that unemancipated children have a constitutionally protected freedom of or from religion as against the wishes of their parents. Certainly he could not have been unaware that the compulsory education laws and the truancy regulations of all the states compel several million children to attend parochial schools at the free choice of their parents. And he could not have imagined any unemancipated child obtaining an injunction forbidding his parents to force him even to church services! The point is that, neither in the Illinois or the New York released time plan, was there any compulsion or pressure upon the parents involved. They wanted religious instruction for their children, and they freely signed requests therefor. That being so, just what was the unconstitutional compulsion or pressure which Justice Jackson found so distressing?

³¹ *Zorach v. Clauston*, 343 U.S. 306, 325 (1952) (dissenting opinion of Jackson, J.).

³² 340 U.S. 268 (1951).

³³ 345 U.S. 67 (1953).

In the case of *In Matter of Weberman*,³⁴ 1950, a lower court of New York found the State's power over minors sufficient to sustain a law requiring all children, regardless of the school attended, and regardless of the religious beliefs of the children or their parents, to be instructed "in at least the eleven common school branches (specified by statute) of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York State." The decision was not appealed. Appeal would have been futile. The Court of Appeals of New York and the United States Supreme Court would certainly affirm state power to require, and to regulate reasonably, the teaching of such secular subjects in all schools, public and private, secular and religious. And so too with legal requirements and qualifications of teachers in all schools. But, if a state may require and regulate such subjects in all schools, why may it not support the teaching of such subjects in all schools? If the regulation of such subjects in parochial schools is not an establishment of religion, why would the support of the same subjects be an establishment of religion? Is regulation less an establishment than support? Support, I assume, could be refused. Regulation, in the nature of things, cannot be refused. Can the cake be had and eaten too? Where is the logic in saying that when the state regulates parochial schools it is not establishing religion, but if it should support them, even in the teaching of secular subjects, it would be?

In the *Everson Case*, which upheld the New Jersey reimbursement statute, Justice Black went out of his way to observe that "we do not mean to intimate that a state

³⁴ 198 Misc. 1055, 100 N.Y.S.2d 60 (Sup. Ct. 1950).

could not provide transportation only to children attending public schools."³⁵ He did not continue far enough, however, to observe how such discrimination, in a public welfare measure, would square with the equal protection clause of the Amendment.

The Supreme Court, in determining what personal rights are "to be ranked as fundamental," has referred to "those canons of decency and fairness which express the notions of justice of English-speaking peoples." The notions of English-speaking peoples have a certain practical value, at least, in judging whether personal rights are fundamental or not. Now English has been spoken in England, Ireland, and Canada for a considerable time. But, I dare say that Catholics in England, Jews in Ireland, and Protestants in Canada, would be somewhat surprised and mildly amused to be told, on the authority of the United States Supreme Court, that Catholicism is established in England, Judaism is established in Ireland, and Protestantism is established in Canada, because all those nations grant some form of equitable aid to "confessional" schools, in accordance with the free choice of parents and the equal treatment of children. Is such assistance a violation of "those canons of decency and fairness which express the notions of justice of English-speaking peoples"? Does such help violate some fundamental right "implicit in the concept of ordered liberty"? Logic is neither truth nor justice: it could be a help in the judicial pursuit of both.

Policy

The interpretation is wrong as a matter of judicial policy. By this I do not mean, of course, that the Supreme Court has any

³⁵ *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

authority to act in the capacity of a super-legislature to determine the legislative policies of the nation or the states. Quite the contrary. But there are judicial policies also. One of the most important, known as "judicial restraint," is the policy of not interfering with legislative policies, which enjoy a presumption of constitutionality, unless that presumption is clearly overcome and the Constitution clearly commands. To illustrate: in 1897, New York enacted a labor statute prohibiting employees in bakeries from working more than ten hours a day and sixty hours a week. In 1905, with what is now regarded as a remarkable lack of judicial restraint, the Court in *Lochner v. New York*³⁶ invalidated the statute. Justice Peckham, speaking for the Court, said: "The statute necessarily interferes with the right of contract between the employer and employés. . . ." ³⁷ Therefore it violated "the liberty of the individual protected by the fourteenth amendment."³⁸ The Court vindicated the liberty of bakers to work more than ten hours a day and more than sixty hours a week! In one of the most famous dissents in constitutional history, however, Justice Holmes wrote:

I think it is my duty to express my dissent. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A Constitution is not intended to embody a particular eco-

nomie theory. . . . I think that the word "liberty," in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.³⁹

This famous expression of the doctrine of judicial restraint has since become the professed policy of the Court. The Court no longer reads into the due process clauses of the fifth or fourteenth amendments the particular economic theory of *laissez faire* liberty of contract, which proved to be a pretty abstract liberty and a rather sterile freedom for the bakers of New York.

But the salutary policy of judicial restraint was forgotten, I submit, when the Court formulated its novel concept of an establishment of religion. One might paraphrase Justice Holmes: The fourteenth amendment does not enact Mr. James Madison's theology or Mr. Leo Pfeffer's philosophy. . . . A Constitution is not intended to embody a particular religious theory or a particular philosophy of education. . . . I think that the word "liberty," in the fourteenth amendment, is perverted when it is held to prevent a greater freedom of religion, a more practical freedom of parental choice in education, and a more equitable treatment of children without discrimination.

Another important judicial policy, which I believe the Court ignored in interpreting the establishment clause, is the policy of interpreting a constitutional provision or a statute according to the common understanding of its terms in the minds of those who ratified or enacted it, at the time and

³⁶ 198 U.S. 45 (1905).

³⁷ *Id.* at 53.

³⁸ *Ibid.*

³⁹ *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (dissenting opinion of Holmes, J.).

in the circumstances of its ratification or enactment. The private writings and even the public speeches of legislators may be of interest in showing what they personally intended a piece of legislation to mean or what they personally thought it meant. It is a pretty poor cause which cannot find some plausible support in legislative history. The technique of "loading the legislative record" is not an unknown sophistication.

There is an admitted danger in qualifying the formal text of a constitution or a statute by expressions found in the letters, speeches, and debates of legislators who frequently indicate only their personal and tentative opinions or hopes in the hurly-burly give-and-take of political advocacy and compromise. Justice Frankfurter, in *Adamson v. California*,⁴⁰ said: "What was submitted for ratification was his proposal, not his speech."⁴¹ And Justice Holmes once wrote: "We do not inquire what the legislature meant, we ask only what the statute means." This policy or principle of interpretation is especially important in the case of a constitutional amendment, whose ratification requires the approval, not merely of the Congress, but of three-fourths of the states.

It was the legislatures of the thirteen original states which ratified the first amendment, and they obviously did so according to the common understanding of an establishment of religion which prevailed throughout the states in 1791. But this common understanding principle of interpretation was ignored by the Court, it seems to me, in its preoccupation with the writings of Madison and Jefferson.

Jefferson was in France when the first

amendment was ratified. His metaphor, "a wall of separation between church and state," was not written until eleven years after the ratification. It appeared in a private letter of courtesy, in brief reply to the felicitations of the Danbury Baptist Association. Yet the Court speaks of "a wall of separation between church and state," whatever that polite metaphor meant, as though it were a part of or a substitution for the formal text of the amendment itself.

Justice Frankfurter wrote in *McCullum*: "Separation means separation, not something less."⁴² This seems to me a strange bit of judicial foot-stamping for a man who was interested in proposals, not speeches. The amendment says nothing about separation. Establishment means establishment, not something less. But the Court has made it mean a great deal less — a great deal less than the official preferment by law of one religion over others, or the setting up by law of civil disabilities based upon religious belief or worship. Justice Cardozo once remarked that a metaphor is a dangerous and shifting foundation for a rule of law. Moreover, metaphor or not, the fact is that the thirteen original states did not ratify Thomas Jefferson's picturesque prose in 1802. They ratified the formal text of the first amendment in 1791, according to the common understanding of the term "establishment of religion" which prevailed throughout the original states at that time.

Ironically enough, in his annual report of 1822, as the Rector of the tax-supported University of Virginia, Thomas Jefferson advocated the construction of "religious schools on the confines of the University," urging that "such establishments would offer the further and greater advantage of

⁴⁰ 332 U.S. 46 (1947).

⁴¹ *Id.* at 64 (concurring opinion).

⁴² *McCullum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (concurring opinion of Frankfurter, J.).

enabling the students of the University to attend religious exercises with the professor of their particular sect," and explaining that "such an arrangement . . . would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion."

Those who are determined to drive every vestige of religion out of public life, even that segment of public life which is primarily parental and secondarily civic, prefer to quote Jefferson's private metaphor of 1802 instead of his recommendation of 1822. The recommendation of 1822 prompted Professor Alexander Meiklejohn to point out that Thomas Jefferson should be considered one of the earliest advocates of the released time plan which the Supreme Court condemned in 1948 — largely on Jefferson's metaphor of 1802! It is highly unfortunate for the common welfare, parental freedom, and the equitable treatment of school children, that the Court reached for an *ex post facto* metaphor instead of its own professed policies of judicial restraint and judicial interpretation by the common understanding of ratified terms.

The United States Supreme Court's interpretation of the establishment clause produced a particularly bitter result in a recent Vermont case. The town of South Burlington, Vermont, has no public high school of its own. In accordance with a Vermont statute, the South Burlington School District had been paying the tuition of its children at neighboring public high schools and at accredited private high schools, secular or religious, according to the free choice of tax-paying parents. On January 3, 1961, the Supreme Court of Vermont, feeling constrained by the opinions in *Everson*, *McCollum* and *Zorach*,

decided, in the case of *Anderson v. Swart*,⁴³ that the fourteenth amendment forbids the South Burlington School District, despite the authorizing statute, to pay the tuition of South Burlington children at Rice Memorial High School and Mount Saint Mary's Academy or any other "sectarian school within or without the State."

As a result, the fundamental personal liberty protected by the fourteenth amendment now means that South Burlington parents may no longer choose accredited religious high schools for their children, unless they are financially able to pay twice, or are succored by private charity. Those who still so choose must continue, of course, to pay taxes to provide tuition for other parents' children at public high schools out of town. It is interesting to note that Walter O. Anderson, the parent whose name appears (because alphabetically first) in *Anderson et al. v. Swart*,⁴⁴ happens to be a non-Catholic whose son attends the Catholic Rice Memorial High School in South Burlington.

Out of a total of 42,429 public school systems in the United States, 21,646 did not have any secondary school facilities in 1960. The Vermont decision does not, of course, control beyond the borders of that state. But, if followed in other states, it could effectively curtail the practical freedom of many thousands of parents, and effectively deprive many more thousands of school children of the equal protection of the laws. In deciding *Anderson v. Swart*,⁴⁵ the Vermont Supreme Court said:

Considerations of equity and fairness have exerted a strong appeal to temper the severity of the mandate. The price it demands

⁴³— Vt. —, 167 A.2d 514, *cert. denied*, 6 L. Ed. 2d 384 (1961).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. . . . Equitable considerations, however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law.⁴⁶

"The fundamental law," according to the court, "enjoins the state from participating in the religious education," selected by the parent, even to the extent of supporting the secular subjects required and regulated by law. But the court does not bother to explain how "the same fundamental law" permits the state to participate "in the religious education," selected by the parent, to the extent of requiring and regulating by law those same secular subjects. The law makes many distinctions. Some of them, because of the complexity of human life, are very subtle and refined. But the distinction between secular and religious subjects in education is a very simple and practical one. It does not overpower the legal mind. The law of every state draws this distinction in requiring and regulating the teaching and teachers of secular subjects in religious schools. What intellectual inhibition prevents the judicial mind from applying the same distinction concerning support that it applies so easily concerning regulation? What is the constitutional difference between participation by support and participation by regulation? Is cost accounting a stranger to the law? Or too

mysterious for judicial comprehension? One thing is a mystery: how there can be an establishment of religion in state or federal aid to the teaching of secular subjects in all schools without discrimination, and yet no establishment of religion in governmental regulation of the same subjects in all schools without discrimination.

The Vermont Supreme Court had the grace to concede that its concept of fundamental liberty in the fourteenth amendment is something less than equitable and fair. "Equitable considerations, however compelling, cannot override existing constitutional barriers." The existing constitutional barriers were erected by the United States Supreme Court in *Everson*, *McColum* and *Zorach*, by its erroneous interpretation and transference of the establishment clause to the fourteenth amendment.

Since the historical meaning of the establishment clause is the official preferment by law of one religion over others, or the creation by law of civil disabilities based upon religious belief or worship, the Vermont decision comes close to being an "establishment of non-religion." Parents who choose to send their children to accredited religious schools, because of religious belief and worship, and are able to do so, are now civilly disabled from sharing in the common educational funds for which they are still taxed. This is preferment by law of non-religion.

On March 29, 1961, in an effort to re-examine the "existing constitutional barriers," a petition for a writ of *certiorari* to the Vermont Supreme Court was filed in the Supreme Court of the United States. On May 15, 1961, the petition was denied.⁴⁷ The public welfare, the practical freedom of parents in education, and the

⁴⁶Anderson v. Swart, *supra* note 43 at —, 167 A.2d at 520, *cert. denied*, 6 L. Ed. 2d 384 (1961).

⁴⁷ Anderson v. Swart, 6 L. Ed. 2d 384 (1961).

equitable treatment of all school children without discrimination, will have to wait awhile.

Other Considerations

In addition to the foregoing constitutional difficulty, other objections have been raised against tax aid to the education of all school children. There are some who assert that such aid would be divisive of national unity, that it would increase religious tensions, and that it would pose a threat to our civil liberties. I offer brief comment on these objections.

Divisiveness

It is said that such aid would be divisive of national unity. In view of the fact that tax aid to some, excluding others, is so obviously divisive in the sense of being discriminatory and arousing the bitterness which discrimination always engenders, it is difficult to understand the divisiveness of aid to all without discrimination. Unless, of course, it rests upon an implication that religious schools are divisive per se. Unless, that is, it stems from the conviction that religious schools themselves are something less than American, to be tolerated perhaps for those who can afford them, but to be legally discouraged and economically handicapped in the interests of real Americanism. It is not easy to be patient with this relic of nineteenth century religious and political bigotry. Suffice it to say that, if religious schools are divisive per se, the divisiveness is a fundamental constitutional right in our pluralistic society. For we are a pluralistic, not a monolithic, society. Justice Frankfurter wrote in 1940, in *Minersville School District v. Gobitis*:⁴⁸

Great diversity of psychological and ethical

opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. *Pierce v. Society of Sisters*.⁴⁹

Some religious schools may be divisive. Some public schools may also be divisive. The shameful history of racial segregation in our schools does not show, I dare say, that invidious divisiveness is a peculiar attribute of one type of school. The peaceful and friendly coexistence of public and religious school systems in our great cities should lay the ghost of the "divisiveness" argument.

Stalin, Hitler and Mussolini were vigorous opponents of divisiveness. But the national unity of the United States is not, thank God, the unity of dictatorship. It is not conformism by the bayonet or the concentration camp. Neither is it the amorphous homogeneity of the melting-pot. It is the harmonious coexistence, and cooperation for the common good, of a free people with theological, philosophical, political and institutional differences. As Justice Jackson said in 1943, in the flag salute case of *West Virginia Board of Educ. v. Barnette*:⁵⁰ "Compulsory unification of opinion achieves only the unanimity of the graveyard."

Religious Tensions

It is said that such aid would increase religious tensions. This plea has a familiar ring. It is heard most frequently in the fight

⁴⁸ *Id.* at 598-99.

⁵⁰ 319 U.S. 624, 641 (1943).

⁴⁸ 310 U.S. 586 (1940).

for racial justice. We have been urged to play down the racial issue because racial tensions have increased since the Supreme Court reversed itself in 1954. It is true that racial tensions have increased since the *School Segregation Cases*.⁵¹ The return to barbarism in Little Rock and New Orleans, and recently in Birmingham and Montgomery, show the fact. There would be no racial tensions if racists could enjoy without protest the privileges and preferences of white supremacy, and if Negroes would docilely accept the discouragements and disabilities of second-class citizenship for themselves and their children. Yet increased racial tensions, tragic and savage in some of their manifestations, are the signs and the price of progress. They are the growing pains of racial justice and of eventual racial peace. I salute the courage and the heroism of the American Negro. It seems incredible to me to argue that, because the anger of racists is aroused, the Negro should give up his long and laudable struggle for liberty and equality for himself and his children.

And so with equal aid to all school children. Two of the basic issues are parental freedom, including religious liberty, and the equal treatment of children. These are not merely fundamental issues of justice and constitutional rights. They are also the wellsprings of profound and noble human emotions. They cannot forever be ignored by legislators, judges or the public at large. The faithful parent cannot forever acquiesce in the practical limitation of his religious liberty. The responsible parent cannot forever agree to the practical restriction of his freedom to choose the education of his child. The devoted parent cannot forever be satisfied to see his child excluded from the common care and the general welfare

of a democratic society. In fact, the more faithful, the more responsible, the more devoted, and the more democratic a parent is, then the more bitterly he will resent, and the more insistently he will fight, the inequality visited by law upon his child.

It seems to me that the parents of children in parochial schools could and should draw courage and strength from the example of their heroic Negro brethren in the fight for liberty and equality. It seems incredible to me to argue that, because some folks get awfully angry at the thought of equal treatment for all school children, the parents of excluded children should quit the fight for equality. Is this the counsel of prudence? Prudence is not a dirty word for cowardice. Courage appears to be the virtue most needed for the eventual triumph of this just and liberal cause. It may be that many parents think the cause is hopeless. Undoubtedly many Negroes once thought that the "equal but separate" doctrine of *Plessy v. Ferguson*⁵² in 1896 was a hopeless obstacle to eventual justice. But fifty-eight years later the Supreme Court reversed *Plessy* in the *School Segregation Cases*. It was a long struggle. But justice, especially in a democracy, is never hopeless.

Civil Liberties

It is said that such aid would pose a threat to civil liberties. Again, it is difficult to understand such a threat arising out of more practical religious liberty, more practical parental freedom, and more equitable treatment of children. However, an eminent law professor once said to me that, whatever the merits of the constitutional issue, he feared a danger to civil liberties in tax aid to religious education. To the best of my recollection, he put it this way:

⁵¹ 347 U.S. 483 (1954).

⁵² 163 U.S. 537 (1896).

Analyzing my position, I suppose it is based on emotion. The emotion is fear. The fear is of organized religion. For the history of organized religion is the history of kicking other people around. Tax aid would strengthen religious schools. Strengthened religious schools would increase the power of organized religion. Organized religion would then exercise its rights exuberantly. The exuberance would threaten the civil liberties of others.

The professor shall remain anonymous because the conversation was private. Moreover, I cannot be certain of a completely accurate recall of his exact words. The sentiment expressed, however, was candid and honest. I recount it because it reflects the feelings of many sincere people, misguided as I believe them to be.

It cannot be denied that the religious wars of 16th and 17th century Europe, and the religious bigotry of 18th and 19th century America, provide an historical background for a fear of organized religion "kicking other people around." History provides a background for a fear of organized government making exuberant use of its feet too. Less than a hundred years ago, in the land of the free and the home of the brave, we maintained the savage abomination of human slavery.

The historical background is a compelling reason for guarding against any official preferment by law of one religion over others, against any creation of civil disabilities based upon religious belief or worship, against any infringement of the free and equal rights of conscience. The first and fourteenth amendments were ratified precisely to do this. The historical background is no reason, however, for an official preferment by law of non-religion over religion, or the creation of civil disabilities based upon parental choice of religious

education for children. This is what the Supreme Court's current interpretation of the establishment clause does in practical effect.

Was there any exuberant pedal activity in South Burlington, Vermont, when all parents could freely choose the education of their children, and all children could share equally in the community's concern for education? Who is kicking whom? The argument that aid to the education of all children would endanger our civil liberties seems to ignore some very precious ones. It seems to imply that parents of children in religious schools should be kept in second-class citizenship for fear that, if granted first-class citizenship, they would abuse it. And all in the name of civil liberties, God save the mark! The fear of the abuse of liberty has a long and pitiful career in the denial of liberty. Civil liberties, it seems to me, are better protected when they are allowed to exist in everyday life.

Liberalism, as a political philosophy, advocates the maximum of freedom consistent with equal justice and social order. Moreover, it evaluates freedom, justice, equality and order, not in academic abstractions or sterile legal concepts, but in the practical context of social life. It argues for legal restrictions only in the interests of a larger practical freedom in the complex political, economic, industrial, technological and social circumstances of a dynamic society. It is sensitive to social injustice and lack of real freedom. It is seldom satisfied with things as they are. It does not fear change and experiment, as conditions change or as freedom can be better served. And the test is pragmatic. Liberals supported the New York bakers in their fight for a maximum hour law, not in the interest of an abstract and futile "liberty of contract," but to se-

cure for the bakers some real justice and some pragmatic freedom in the cruel competitive conditions of their industrial life in 1897. I subscribe to the liberal political philosophy.

I am amazed, therefore, that some professed liberals are indifferent to the economic conditions which pragmatically impede the freedom of poor parents to choose the education of their children. I am shocked that some professed liberals look with equanimity upon the pragmatically unequal treatment of school children. Children have no votes, but they are people. Are these professed liberals "selective" in their liberalism? Is it that they cannot make up their minds who they are liberal for? Or against? Are they the victims of some occult schizophrenia which puts some parents and some children beyond the pale of their liberalism?

I can understand a certain conservative position which sees no evil and no problems of freedom, which is complacent with things as they are, which abhors change, which is afraid of rocking the boat, which is satisfied to muddle through somehow, and which is not unappreciative of the tax advantage enjoyed at the expense of an over-burdened and out-voted minority. But the general welfare, the practical freedom of parental choice, and the equal treatment of school children is clearly and obviously a liberal cause. Where are some of the liberals hiding? Surely they are not afraid of an unpopular liberal cause. Not the liberals!

I have a profound reverence for the Supreme Court of the United States, a sincere respect for the Justices who sit on its bench, and a genuine affection for those whom I have been privileged to know personally. The history of the Court is a tale of independence, intelligence and integrity. It is

not, of course, a saga of infallibility. But the Court, on numerous occasions, has proved its courage and its humility by reversing previous errors in resolute pursuit of "Equal Justice Under Law." The most inspiring example of its courage and humility in the present century was its monumental decision in the *School Segregation Cases*⁵³ of 1954, reversing the 1896 case of *Plessy v. Ferguson*.⁵⁴ The reversal can be attributed to the Court's own scholarship and the fact that the Court, while not subject to political pressure, is amenable to the scholarship of the legal profession. The Court is totally dedicated to the Constitution of the United States and the rule of human reason.

While I am convinced that the Court's current interpretation of the establishment clause of the first amendment, and its transference to the fourteenth, is wrong as a matter of history, as a matter of logic, and as a matter of judicial policy, nevertheless I am confident that some day the Court will see fit to permit the federal government and the states to provide for the general welfare, the practical freedom of parents, and the equal treatment of children, by aiding the education of all school children without discrimination. I am sure that some day the Court will sanction such aid along the principles of the "G. I. Bill of Rights,"⁵⁵

⁵³ 347 U.S. 483 (1954).

⁵⁴ 163 U.S. 537 (1896).

⁵⁵ The constitutionality of the "G. I. Bill of Rights" has never been reviewed by the Supreme Court. It was never litigated because nobody had the "standing to sue." *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447 (1923), involving the Federal Maternity Act of 1921, established the principle that no state and no taxpayer has legal standing to challenge the constitutionality of an expenditure from the *general funds* of the United States. The fact that nobody tried

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EQUAL JUSTICE

(Continued)

which contributed so tremendously in recent history to the general welfare, with freedom and equality for all, and without dividing the national unity, increasing religious tensions, or endangering civil liberties. The cause is just. The Court is fair. The result will come. Some day there will be "Equal Justice Under Law."

to do so, in the case of the "G. I. Bill of Rights," suggests also, it seems to me, the direction of the decencies. But the fact is that the "G. I. Bill of Rights" involved tuition grants, not merely to religious schools and colleges, but also to Protestant and Catholic seminaries and Jewish rabbinical schools for the education of veterans studying to be ministers, priests and rabbis.

In attempting to solve the current constitutional problem, several plans have been suggested involving tax credits or deductions for money spent for tuition at private accredited schools. Such plans would seem to give relief to those only who need it *least*. Take the case of two parents who have four children, with the father earning \$3,600 annually. At \$600 a person, the father already has tax exemptions totalling \$3,600, his entire income! If we are not to relinquish the principles of the graduated income tax, where is his practical freedom of parental choice, and how equally will his four children be treated? Or does it matter?

THOMAS MORE

(Continued)

as informally or as publicly as each might desire, preferred to climb to renown by formal challenges to all comers. Rudeness and self-centredness, rather than plain conceit, incurred this reaction; and if More was rather deadly, in a strictly professional way, he covered his own rudeness with a heavy and diplomatic cloak.⁵¹ Naturally he had the best of it. But it is clear that he did not share the pleasure as ninety-nine out of a hundred people would have done. He told the facts, we may be sure, but the key to the whole thing he kept to himself.⁵²

⁵¹ On More's habit in actual disputation see testimonies gathered in HARPSFIELD, LIFE AND DEATH OF ST. THOMAS MOORE 140-42 (Hitchcock and Chambers ed., London, 1932).

⁵² The joke would have been appreciated by Rastell and Roper, who both wrote about More. Since Roper does not mention the story we can be sure that More did not tell him the key to it. If he did not tell his son-in-law and close confidant he did not tell anybody. The silence of Harpsfield is even more significant, for he knew Roper, More's other legal friends, and the tales circulating about More's cleverness, and he was a learned civilian, which Roper certainly was not.

